TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 565

CHARLES D. NEWTON, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK; EDWARD SWANN, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, ET AL., APPELLANTS,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED SEPTEMBER 22, 1923

(29,875)

(28,875)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 3, 1924

[fol. 1] **DISTRICT COURT OF THE UNITED STATES,**
SOUTHERN DISTRICT OF NEW YORK

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission for the State of New York, First District, Defendants

NOTICE RE COSTS

Take notice, that the within is a copy of the items of the costs and disbursements of the complainant, Consolidated Gas Company of New York, in the above entitled action, and that the same will be taxed by the Clerk of this Court at his office, Post Office Building, Borough of Manhattan, City of New York, on April 26th, 1922, at eleven o'clock in the forenoon.

Dated, New York, April 24th 1922.

Yours, etc., Shearman & Sterling, Solicitors for Complainant, 55 Wall Street, New York City.

To Wilber W. Chambers, Esq., Solicitor for defendant Newton, 51 Chamber Street, New York City; John P. O'Brien, Esq., Corporation Counsel, Solicitor for defendant Swann, Municipal Building; Ledyard P. Hale, Esq., Solicitor for defendants The Public Service Commission, Albany, New York.

[fol. 2] DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

BILL FOR COSTS AND DISBURSEMENTS OF CONSOLIDATED GAS COMPANY OF NEW YORK—Filed Nov. 27, 1922

Costs

Attorney's docket fees.....	20.00	
63 Exceptions to Master's report overruled at $5 each.....	215 [315]*.00	Plaintiff asks that item be increased to 137 exceptions at $5.00 each: total $685.00. Defts. object to rasing item; objn. overruled; exception.
Attorney's docket fee in United States Supreme Court as per mandate case No. 257.....	20.00	
Costs and Attorney's docket fee in United States Supreme Court as per mandate case No. 258.....	362.40	
	[717.40]*	617.40

Deft. objects to allowance of any costs for exceptions—overruled on ground that court did not allow same. Obj. overruled. Exception.

Pltff. asks for allowance of 137 exceptions at $5.00 each. Clerk allows 43 exceptions to Master's Report at $5.00 each and overrules allowance of any costs for exceptions to Master's Opinion. Both sides except.

Disbursements

Printing:

"Complainant's memorandum discussing several points referred to upon the oral argument" used before the Master	3,284.41	Objected to; obj. sust'd; except'n.
Memorandum submited by Complainant in support of its motion for final decree before Hon. Learned Hand	2,024.53	
Reply memorandum for Complainant before Hon. Learned Hand.....	2,735.22	
Printing of Index to Record.....	2,146.45	
Memorandum opposing motion to advance before United States Supreme Court.....	25.30	

[*Figures enclosed in brackets erased in copy.]

[fol. 3]

Motion to consolidate and reassign appeals before United States Supreme Court	44.45	Objected to; obj. sust'd; except'n; confirmed by Judge L. Hand.	
General brief for Appellee on appeal before United States Supreme Court	428.13		
Appellee's brief on the facts and incidental questions of law before United States Supreme Court	10,130.35		
Subject index for above brief	263.80		
Appellant's brief before United States Supreme Court	81.80		
	[$21,164.44]*		[$21,164.44]*
Stenographer's fees for testimony:			
Copy of record for use of and furnished to the Master, [47,760]* folios at [40c]* [30c]* per folio	31,024 [19,104.00]*		[104.00]* 204.80
Reduced by Judge L. Hand to 25c per folio, total $7,756.00, by order Nov. 27, 1922.			
Further reduced by Judge L. Hand's order of May 1, 1923, to 20 cents per folio, total $6,204.80.			
See objections next page and first ruling.			
Compensation and expenses of special masters:			
Abraham S. Gilbert:			
Fees	28,750.00 [57,500.00]*	So reduced by Supreme Court.	
Expenses	655.38		
As per order of Hon. Julius M. Mayer, dated December 13, 1921.			
Richard Welling:			
Fees	15,000.00		
Expenses	2,330.06		
As per order of Hon. Learned Hand, dated March 15, 1922.			
	[75,485.44]*		46,735.44 [75,485.44]*

[*Figures enclosed in brackets erased in copy.]

Witnesses' fees:

Name	Days	Fee	Mileage		
J. Quinn.....	1	$1.50	$10.00		
W. B. Hogan.....	1	1.50	1.10		
O. C. Naumen....	1	1.50	.70		
Chief Deputy Commissioner Taxes & Assessments..	1	1.50	.....		
James P. Donahue	1	1.50	1.70		
Joseph N. Foley..	1	1.50	1.00		
			2.00		
John F. Tracey...	1	1.50	[10.00]* Reduced by Agreement.		
		$10.50	[$24.50]*	[35.00]*	[35.]*
			16.50	27.00	27.

[fols. 4 & 5]

Paid for surety bonds:

Premiums on bonds filed with Special Master Richard Welling in lieu of the deposit of impounded funds with him.....	$76,086.00	$76,086.00
Whole item objected to on grounds set forth in Donnelly affidavit verified May 8, 1922, and as excessive on ground that bonds were given as result of application made to the Court by pltff. on Aug. 9, 1920. Charge of more than ½ of 1% premium objected to. Obj'n overruled. Except'n.		
Paid to clerk of the United States District Court:		136.70
[Deposit]* Clerk's Fees.....	[15.00]*	[15.]*
Total Bill of Costs.....		$192.607.28
Amount paid by complainant at the rate of one half of one per cent for the use of Liberty Bonds borrowed and deposited with the special master in lieu of cash or surety bond....		$28,094.63

Disallowed by Judge L. Hand by order of May 1, 1923.

Item of $12,040.40 stenographer's fees objected to on ground that plaintiff produced stenographer's bills which show no charge for original but a charge of $4.50 a page for approximately 20 copies. Defendants produced stenographer's bills which showed a charge of 30 cents a page for 2 copies and original for court and master at 30 cents per page—1/3 of charge reduced by stenographer to 15 cents per page 1/3 charge. Each of the three defendants were charged at this rate. All bills were based on mimeographed pages—not folios.

[*Word and figures enclosed in brackets erased in copy.]

Item reduced to 32,601 folios at 30 cents per folio $9,780.30. Exception.

Taxed and total costs allowed Plaintiff.....	$129,807.34
Credit:	
Credit to defendants for costs of appeal from the order fixing the Master's allowances as provided in the mandate of the U. S. Supreme Court per Judge L. Hand's order May 1, 1923.	$113.37
Net Amount taxed in favor of plaintiff....	$129,693.97

July 25, 1923.

Alex. Gilchrist, Jr., Clerk.

Jurat showing the foregoing was duly sworn to by Charles A. Vilas omitted in printing.

[fol. 6] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE RE COSTS

Take notice, that a bill of costs of which the within is a copy will be presented to Honorable Learned Hand for retaxation, at his Chambers in the Woolworth Building, Borough of Manhattan, New York City, on the 22nd day of November, 1922, at 5 o'clock, P. M.

Dated, New York, November 15, 1922.

Yours, etc., Shearman & Sterling, Solicitors for Complainant, 55 Wall Street, New York City.

To Wilber W. Chambers, Esq., Solicitor for defendant Newton, 51 Chambers Street, New York City; John P. O'Brien, Esq., Corporation Counsel, Solicitor for defendant Swann, Municipal Building; Ledyard P. Hale, Esq., Solicitor for defendants The Public Service Commission, 30 Church Street, New York City.

[fol. 7] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE RE COSTS

Take notice, that the within is a copy of the items of the costs and disbursements of the complainant, Consolidated Gas Company of New York, in the above entitled action, and that the same will be

taxed by the Clerk of this Court at his office, Post Office Building, Borough of Manhattan, City of New York, on April 26, 1922, at eleven o'clock in the forenoon.

Dated, New York, April 24, 1922.

Yours, etc., Shearman & Sterling, Solicitors for Complainant, 55 Wall Street, New York City.

To Wilber W. Chambers, Esq., Solicitor for defendant Newton, 51 Chambers Street, New York City; John P. O'Brien, Esq., Corporation Counsel, Solicitor for defendant Swann, Municipal Building; Ledyard P. Hale, Esq., Solicitor for defendants The Public Service Commission, Albany, New York.

[fol. 8] DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

BILL FOR COSTS AND DISBURSEMENTS OF CONSOLIDATED GAS COMPANY OF NEW YORK—Filed May 16, 1923

Costs

Attorneys' docket fees.....	$20.00	Plaintiff asks that item be increased to 137 exceptions at $5.00 each, total $685.
63 Exceptions to Master's report overruled at $5 each.....	315.00	Defendants object to raising item. Objection overruled—exception.
Attorneys' docket fee in United States Supreme Court as per mandate case No. 257.....	20.00	Defendants object to allowance of any costs for exceptions overruled on ground that Court did not allow same. Objections overruled; except.
Costs and Attorneys' docket fee in United States Supreme Court as per mandate case No. 258.....	362.40	Plaintiff asks for allowance of 37 Exceptions at $5.00 each. Clerk allows 43 exceptions to Master's report at $5.00 each & overruled allowance of any costs for Exceptions to Master's Opinion. Both sides except.

[fol. 9]

Disbursements

Printing:

"Complainant's memorandum discussing several points referred to upon the oral argument" used before the Master	$3,284.41		
Memorandum submitted by Complainant in support of its motion for final decree before Hon. Learned Hand	2,024.53		
Reply memorandum for Complainant before Hon. Learned Hand	2,735.22		
Printing of Index to Record	2,146.45		
Memorandum opposing motion to advance before United States Supreme Court	25.30	Objected to; objection sustained; exceptn.	
Motion to consolidate and reassign appeals before United States Supreme Court	44.45		
General brief for Appellee on appeal before United States Supreme Court	428.13		
Appellee's brief on the facts and incidental questions of law before United States Supreme Court	10,130.35		
Subject index for above brief	263.80		
Appellant's brief before United States Supreme Court	81.80		
	$21,164.44		$21,164.44

Off $21,164.44.

Stenographer's fees for testimony:

Copy of record for use of and furnished to the Master [32,601]* [47,760]* folios at [40c]* 30c per folio, Reduced by Clerk to 30c	[9,780.30]* [19,104.30]*		7,756.00 [9,307.20]* [9,780.30]* [19,104.30]*

Reduced by Judge Hand to 25 cents per folio—total, $7,756.00.
See objn. & exception at end.

Compensation and expenses of special masters:

Abraham S. Gilbert:	28,750.		
Fees	[57,500.00]*	As reduced by Supreme Court. Objected to on ground that appeal pending on Gilbert and about to be taken on Welling. Objection overruled. Exception.	
Expenses	655.38		

As per order of Hon. Julius M. Mayer, dated December 13, 1921.

[*Figures enclosed in brackets erased in copy.]

[fols. 10 & 11]

Richard Welling:			
Fees		15,000.00	
Expenses		2,330.06	
			46,735.44
		[75,485.44]*	$[75,485.44]*

As per order of Hon. Learned Hand, dated March 18, 1922.

Witnesses fees:

Name	Days	Fee	Mileage			
J. Quinn	1	$1.50	$10.00			
W. B. Hogan	1	1.50	1.10			
C. C. Naumon	1	1.50	.70			
Chief Deputy Commissioner, Taxes & Assessments	1	1.50	.....			
James P. Donahue	1	1.50	1.70			
Joseph N. Foley	1	1.50	1.00			
			2.00		Reduced by agreement.	
John F. Tracey	1	1.50	[10.00]*			
		$10.50	[$24.50]*	[35.00]*		[35.00]*
			16.50	27.00		27.00

Paid for surety bonds:

Premiums on bonds filed with Special Master Richard Welling in lieu of the deposit of impounded funds with him	$76,086.00	$76,086.00

Whole item objected to on grounds set forth in Donnelly affidavit verified May 8, 1922, and as excessive and on ground that bonds were given as result of Appeal made to the Court by Pltff. on August 9, 1920—charge of more than ½ of —% Premium objected to; objection overruled; exception.

Paid to Clerk of the United States District Court:

Deposit	[16.00]*	[16.00]*
Total Bill of Costs		$192,607.28

Stenographers fees:

9,307.20

Items of $[12,640.40]* objected to on ground that plaintiff produced stenographers bills, which show no charge for original, but a charge of $4.50 a page for approximately 20 copies. Defendants produced stenographers bills which showed a charge of 30c a page for 2 copies and original for court and master at 30c per page—1/3

[*Figures enclosed in brackets erased in copy.]

of charge reduced by stenographer to 15c per page 1/3 charge. Each of the three defendants were charge- at this rate. All bills were based on mimeographed pages—not folios. See affidavits of J. A. Donnelly and Harry Hertzhoff.

31,024	9,307.20
Item reduced to 32,601 folios at 30c per folio..	$[9,780.30]*

Jurat showing the foregoing was duly sworn to by Charles A. Vilas omitted in printing.

[fol. 12] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT IN OPPOSITION—Filed Nov. 27, 1922

STATE OF NEW YORK,
City & County of New York, ss:

James A. Donnelly, being duly sworn, deposes and says:

I am a solicitor of this court, and Assistant Corporation Counsel of the City of New York, associated with the solicitor for the above named defendant, Edward Swann, and am familiar with the proceedings herein.

I have carefully examined the proposed bill of costs and disbursements of complainant in this matter and I depose and say:

1. As to the first item "Attorneys' docket fees, $20.00"—I find that such docket fees are included in the fourth item shown on the bill of costs designated as "Costs and attorneys' docket fee in the United States Supreme Court as per mandate case No. 258, $362.40." I attach hereto copy of a letter under date of March 14, 1922, from the clerk of the United States Supreme Court to Hon. Wilber W. Chambers, Deputy Attorney-General, in which the clerk states that the mandate of the court directs the District Court to issue execution for the costs of the appellant in this court in the amount of [fol. 13] $342.40 and the taxed attorneys' fee of $20, a total of $362.40. Thus, it conclusively appears that the attorneys' docket fees are included in the sum of $362.40 named in the mandate.

2. As to the second item on the bill of costs and disbursements designated as "63 exceptions to master's report overruled at $5 each, $315.00"—I find upon careful examination of the record that there were 62 exceptions taken to the master's report and filed by the defendants herein, and not 63 as alleged by complainant. By the amended decree entered herein on August 11th, 1920, the following exceptions were overruled:

1. To Finding marked "1."
2. " " " "3."
3. " " " "4."
5. " " " "6."
6. " " " "7."
7. " " " "8."
8. " " " "9."
9. " " " "10."
10. " " " "11."
11. " " " "13."
12. " " " "16."
13. " " " "17."
15. " " " "19."
16. " " " "20."
17. " " " "21."
18. " " " "22."
22. " " " "28."
26. " " " "33."
34. " " " "43"
36. " " " "45."
37. " " " "46."

[fol. 14]

39. To Finding marked "50."
41. " " " "52."
54. " " " "67."
55. " " " "68."
58. " " " "71."
62. " " " "77."

The following exceptions were modified:

4. To Finding marked "5."
14. " " " "18."
51. " " " "62."

All the other exceptions to the report of the master are sustained.

In the amended decree of August 11, 1920, Judge Learned Hand also overruled the exceptions to the following numbered findings of the master:

Two, fourteen, fifteen, twenty-five, twenty-six, twenty-nine, forty, forty-one, forty-eight, fifty-three, sixty-six, seventy-five and seventy-six, and modified the exception to the finding marked fifty-three.

There were no exceptions to the last mentioned findings by the defendants.

At the time that the exceptions to the report of the special master were overruled by Hon. Learned Hand, he did not impose costs, amounting to $5 for each exception so overruled, though in my opinion such was discretionary with him. Failure on the part of Hon. Learned Hand to impose such discretionary costs upon the defendants herein, I think, justifies the exclusion of this item in the bill of costs.

3. As to the first item under "Disbursements, printing," Complainant's memorandum discussing several points referred to upon [fol. 15] the oral argument used before the master, $3,284.41"—This memorandum consists of 193 pages, was a gratuitous effort on the part of complainant to place certain favored facts before the special master; throughout the trial the said special master frequently stated that he would not accept any briefs from any of the parties. Statements made by the special master clearly showing that he did not desire briefs submitted to him will be found on pages 15917, etc. of the record. Furthermore, such printed memorandum is not required by any of the rules of this court. These facts justify the disallowance of such item. The amount of this item clearly shows that these disbursements covers the printing of a great number of memoranda, far more than were really necessary for submission to the special master.

4. As to the second item under "Disbursements, printing," "Memorandum submitted by complainant in support of its motion for final decree before Hon. Learned Hand, $2,024.53"—this memorandum consists of 255 pages and is not a taxable item under any rule of this court. Furthermore, the item is grossly excessive and covers the cost of printing many copies of this memorandum, more than was necessary for submission to the court.

5. As to the third item under "Disbursements, printing," "Reply memorandum for complainant before Hon. Learned Hand, $2,735.22"—this memorandum consists of 236 pages, and it is not taxable under the rules of this court. Furthermore, the item is grossly excessive and covers the cost of printing many copies of this memorandum, more than were really necessary for submission to the court.

6. As to the fourth item under "Disbursements, printing," "Printing of index to record, $2,146.45."—it appears that the defendants [fol.16] were the appellants in the United States Supreme Court and prepared a proper and sufficient index to the record, which was printed with the other papers on the appeal, and that the index to the record referred to herein was a gratuitous effort on the part of complainant and was superfluous. Complainant has resisted every effort made by the defendants to procure a copy of this index to the record, and has always insisted that such index was the personal property of complainant and defendants have never been able to procure a copy of such index. I am unable to state the extent of its use by any court, for I am not aware it was ever submitted to any court, but kept always in the possession of the complainant. Such index is not taxable under the rules of this court or of the United States Supreme Court. The clerk of the United States Supreme Court has taxed all proper disbursements allowable in that court and included them in the mandate herein.

7. As to the fifth item under "Disbursements, printing," "Memorandum opposing motion to advance before United States Supreme Court, $25.30"—it appears that in the final decree made by Judge

Hand on August 11, 1920, the defendants were in duty bound to perfect and prosecute the appeal promptly and without delay, and in accordance with that provision the defendants did bring on such appeal and moved to advance the hearing of such appeal in accordance with the letter of the decree. The item charged herein against the defendants relates to a memorandum opposing the defendant's motion to advance the appeal and was therefore in violation of the decree rendered by Judge Hand, compelling the defendants to move to advance the appeal for an early hearing; moreover, it was in the United States Supreme Court and no such item is taxable in that court.

8. As to the sixth item under "Disbursements, printing," "Motion to consolidate and reassign appeals before United States Supreme [fol. 17] Court, $44.45"—it appears that this motion was necessary because appellee was not ready to argue when the case was reached in October, 1921. It was a motion made for its own benefit and no costs were allowed by the United States Supreme Court, on the motion. There is no rule in this court permitting the taxation of such an item as a disbursement.

9. As to the seventh item under "Disbursements, printing," "General brief for appellee on appeal before United States Supreme Court, $428.13"—this brief consists of 60 pages. No such costs were allowed by the clerk of the United States Supreme Court, and as a matter of fact such disbursements are not taxable. Moreover, the bill of costs does not show how many copies were printed nor how many pages the brief contained.

10. As to the eighth item under "Disbursements, printing," "Appellee's brief on the facts and incidental questions of law before the United States Supreme Court, $10,130.35"—it appears that this brief consists of 495 pages, and that as stated by Charles A. Vilas, Counsel for Complainant, numerous copies thereof were distributed by him. No such costs or disbursements are allowable under any rule of the United States Supreme Court, but, on the contrary, the decision of the case of Ex Parte Hughes, 114 U. S. 548, expressly holds that such disbursements are not taxable.

11. As to the ninth item under "Disbursements, printing," "Subject index for above case, $263.80"—it appears that this index consists of 27 pages. This index was an innovation in the United States Supreme Court, was not required by any rule, and is not taxable under any rule of this court; inasmuch as the brief is not a taxable item surely an index to a brief would not be a taxable item.

[fol. 18] 12. As to the tenth item under "Disbursements, printing" "Appellant's brief before the United States Supreme Court, $81.80"—this brief consists of 20 pages. It is not a taxable item under any rule of this court or of the United States Supreme Court. Furthermore, the item on its face appears excessive and is the cost of printing a large number of copies of this brief, far more than necessary for submission to the court.

13. As to the item under "Stenographer's fees for testimony", "Copy of record for use of and furnished to the master, 47,760 folios at 40¢ per folio $19,104"—it appears that the charge per folio is excessive, more than the legal rate per folio. Furthermore, the defendants have paid a portion of the stenographer's fees, as will be more clearly shown by the attached vouchers showing such payment. At page 15475 of the record the master denied receiving a copy of the record.

"Mr. O'Brien: Well it is in the record and you have been getting a copy of the record.

The Master: No, I have not had a copy of the record and I have not read Mr. Little's testimony."

This item would not be taxable in the State courts of the State of New York, and there is no rule of this court allowing such item to be taxed unless pursuant to an agreement between the parties in the action and no such agreement was made or entered into. Furthermore, under Equity Rule 50 the fees of a stenographer "shall be fixed by the court" and taxed ultimately as costs. In the above case the stenographer's fees have not thus far been fixed by the court in accordance with such rule.

14. As to the item under "Compensation and expenses of Special [fol. 19] Masters", "Abraham S. Gilbert, fees, $57,500, expenses, $655.38"—the defendants herein appealed to the United States Supreme Court, and also to the Circuit Court of Appeals, from the order fixing such fees and expenses, upon the ground that such fees are grossly excessive, and that in the fixation of such fees the court abused its discretion. This appeal was Case No. 750 on the October, 1921 Term of the Supreme Court of the United States. The appeal was regularly reached and argued on April 28th, 1922, and the matter submitted to the United States Supreme Court. The decision upon such fees is now pending. For these reasons it is submitted that the amount of such fees should not now be inserted in the bill of costs.

15. As to the item under "Compensation and expenses of Special Master," "Richard Welling, Fees, $15,000, expenses, $2,330.06"—the right to appeal from the fixation of such fees has not yet expired. The defendants are now preparing an appeal from the order of Hon. Learned Hand, dated March 15, 1922, which fixed the amount of the fees and expenses of said Special Master.

16. As to the item "Premium on bonds filed with Special Master Richard Welling in lieu of the deposit of impounded funds with him, $76,986.00"—it appears that the decree made herein by Hon. Learned Hand, dated August 4, 1920, (Rec. p. 187a) provides, among other things, as follows:

"* * * The plaintiff shall, on the fifteenth day of August, 1920, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq., (who is hereby appointed special master for that purpose), out of all moneys collected by it for sale of gas in the

City of New York the following sums: All sums in excess of eighty cents collected from all consumers other than the City of New York; [fol. 20] all sums in excess of seventy-five cents collected from the City of New York. And it is

Further ordered, adjudged and decreed that the said Special Master shall deposit all moneys so paid to him, equally in accounts in his name as Special Master * * * at such interest as he can best obtain * * *."

After the entry of the above mentioned decree, complainant made a motion to amend this decree asking to be permitted to withdraw the moneys deposited and in lieu thereof to substitute Liberty Bonds, etc., Judge Hand allowed them to do so (Rec. p. 195a). He stated as follows:

"Provisions for Deposit of Moneys Impounded

The plaintiff urges with force, I think, that to impound all the moneys over eighty cents for a period perhaps of a year will cause loss both to itself and to the consumers. It suggests that it have the right to substitute adequate securities. The best that the special master can get on the deposits is probably three and a quarter per cent.; the plaintiff if required to finance its temporary requirements must pay much more, it says fourteen per cent. In any case it will sustain a loss which will profit no one but the banks, so far as appears. I see no advantage in insisting upon impounding the moneys if adequate security can be otherwise provided. I shall therefore modify the decree by allowing the plaintiff to deposit with the master in lieu of cash Liberty Bonds taken at their market value, or any other bonds which are a proper investment by savings banks in New York." (Rec. p. 189)."

Such motion was opposed by the defendants herein, but it was granted and a direction was made by Hon. Learned Hand as above stated.

He further permitted the complainant to file Surety Bonds under certain conditions:

"Also I allow the plaintiff to substitute surety company bonds for cash or to withdraw cash by giving such bonds, on the following conditions: No single company shall give a larger bond than $500,000, or more than one bond. The bond must secure not only the cash for which it is substituted but interest at seven per cent during the period of its existence, which is to be part of the funds."

[fol. 21] Complainant acted pursuant to such permission and deposited with the special master certain surety bonds, and from the date of the amended decree, on or about August 11, 1920, whatever sums in excess of the statutory rates for gas supplied to general consumers and to the City of New York were charged by complainant have been collected by and used by complainant.

Upon the argument complainant claimed that money used in its gas business was entitled to a return of 8%, so that the use of the moneys withdrawn upon deposit with the special master was of great advantage and of great benefit to the complainant, and the

value of such use, I am convinced, is far more than the premiums upon the surety bonds sought to be charged herein as an item of disbursement.

Furthermore, there is no rule of this court allowing any such disbursements as taxable. The bonds referred to herein which were filed with Special Master Welling were not supersedeas or appeal bonds given pursuant to any statute of this court, but were allowed by Hon. Learned Hand as a convenience to complainant so as to permit it to withdraw and use the moneys which the court had previously directed to be impounded.

James A. Donnelly.

Sworn to before me this 8 day of May, 1922. Harry Hertzoff, Commissioner of Deeds, the City of New York.

[fol. 22] EXHIBITS TO AFFIDAVIT

U. S. DISTRICT COURT

Before Special Master Gilbert.

New York, April 12, 1920.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

vs.

CHARLES D. NEWTON, &c., et al., Defendant

The City of New York to Adams & Chambers, Dr.

Notary Public, Stenographers United States District Court, Rooms 823-4 Park Row Building. (Tel., Barclay 8792)

1920.			
March 1-30. To Mimograph copies of proceedings—daily copy:			
1,983 pages at .60 (2 copies)	$1,189.80		
1,191 pages at .30, 1/3 charge taking defendant's proofs—original for Court, Copy for Master.....	357.30	$1,547.10	
Reduced by agreement		178.65	
			1,368.45

Duplicate.
Printed copies to be furnished later without extra charge.

[fol. 23] U. S. District Court

Before Special Master Gilbert.

New York, January 31, 1920.

Consolidated Gas Company of New York, Complainant,

vs.

Charles D. Newton, &c. et al., Defendants

The City of New York to Adams & Chambers, Dr.

Notary Public, Stenographers United States District Court, Rooms 823-4 Park Row Building. (Tel., Barclay 8792)

1920.

Jan. 5-30.	To Mimograph copies of proceedings, daily copy:		
	3,470 pages at .60 (2 copies)	2,082.00	
	3,414 pages at .30 1/3 charge taking defendant's proofs, Original for Court, Copy for Master	1,024.20	$3,106.20
	Reduced by agreement		512.10
			$2,594.10

Duplicate.
Printed copies to be furnished later without extra charge.

[fol. 24] UNITED STATES DISTRICT COURT

Before Special Master Gilbert.

New York, February 28, 1920.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

vs.

CHARLES D. NEWTON, &c., et al., Defendants

The City of New York to Adams & Chambers, Dr.

Notary- Public, Stenographers United States District Court, Rooms 823-4 Park Row Building. (Tel., Barclay 8792)

1920.			
Feb. 9-27.	To Mimeograph copies of proceedings—daily copy:		
	3,586 pages at .60 (2 copies).....	$2,151.60	
	3,037 pages at .30, 1/3 charge taking defendant's proofs, original for Court, Copy for Master.....	911.10	$3,062.70
	Reduced by Agreement		455.55
			$2,607.15

Duplicate.
Printed copies to be furnished later without extra charge.

[fol. 25] Supreme Court of the United States

Office of the Clerk

Washington, D. C., March 14, 1922.

Hon. Wilber W. Chambers, Deputy Attorney-General, New York City.

DEAR SIR: The mandate of this court in the case of Consolidated Gas Company of New York v. Newton, Attorney-General, etc., et al., No. 258, October Term, 1921, having been issued today, pursuant to the court's order, the same has been handed to Mr. Charles A. Vilas, of the firm of Shearman & Sterling, New York City. The decree of this court modified and affirmed the decrees of the District Court, with costs to be paid by the appellees. The mandate of this court, therefore, directs the District Court to issue execution against your clients for the costs of the appellants in this court, $342.40, and the taxed attorney fee of $20.00, a total of $362.40.

Herewith I hand you bill for costs of the appellees, amounting to $13.20, to which I ask your attention. This is in addition to the amount included in the mandate, and should be paid here.

Yours truly, William R. Stansbury, Clerk, By H. S. Ass't. TFD.

[fol. 26] Supreme Court of the United States

Office of the Clerk

Washington, D. C., March 14, 1922.

Hon Wilber W. Chambers, Deputy Attorney-General, New York City.

Dear Sir: The court having this day granted a motion that the mandate of this court issue at once in the case of Newton, Attorney-General, et al. v. Consolidated Gas Company of New York, No. 257, October Term 1921, wherein the decrees of the District Court were affirmed with costs on March 6th, last, the mandate, therefore, has been delivered this day to Mr. Charles A. Vilas, of the firm of Shearman & Sterling, New York City. It directs the District Court to issue execution against your clients for the sum of $20.00, attorney's docket fees in the case, which sum should be paid in that court.

Herewith I hand you bill for costs incurred in this court, amounting to $49.95. Crediting the deposit of $25.00 heretofore made by you, leaves balance due of $24.95 to which I beg to ask your attention. This amount should be paid here.

Yours truly, William R. Stansbury, Clerk, By H. S., Ass't.

TFD.

[fol. 27] District Court of the United States for the Southern District of New York

[Title omitted]

Defendants' Objections—Filed Nov. 27, 1922

The defendants, Charles D. Newton, as Attorney General of the State of New York, and Edward Swann, as District Attorney of the County of New York, make the following objections to the complainant's proposed bill of costs and disbursements in the above-entitled matter:

(1) Defendants object to the allowance of the item "63 exceptions to the Master's report overruled, at $5 each, $315," for the reasons: (a) There were sixty-two exceptions to the Master's report filed by the defendants and not sixty-three as alleged by the complainant; (b) By the amended decree entered herein on August 11, 1920, Judge Learned Hand made the following disposition of defendants' exceptions. He overruled twenty-seven, modified three and sustained the others. In overruling exceptions filed by the defendants, Judge Learned Hand imposed no costs.

(2) Compensation and expenses of Special Master Abraham S. Gilbert in the sum of $57,500, and expenses, amounting to $655.38. The reason for this objection is that the granting of this allowance

[fol. 28] is now before the United States Supreme Court upon appeal, and the matter has already been argued and a decision pending. We ask that the fixation of costs and disbursements be held until the United States Supreme Court finally disposes of this question.

(3) Defendants object to the disbursements for printing "Complainant's Memorandum, discussing several points referred to upon the oral argument used before the *the* Master," amounting to $3,284.41; also "Memorandum submitted by complainant in support of its motion for final decree before Honorable Learned Hand," amounting to $2,024.53; also "Reply Memorandum for Complainant before Honorable Learned Hand," amounting to $2,735.22, for the reason that there is no rule of this Court which requires the printing of such papers or allows such disbursements.

(4) The defendants object to the disbursement for printing of "Index to Record," amounting to $2,146.45, for the reason that the defendants were the appellants in the United States Supreme Court and a proper and sufficient index to the record was printed with the other papers on appeal, and further, that the index for which the charge is made was superfluous; and if the same were taxable under the rules of the United States Supreme Court, the Clerk has taxed all proper disbursements and included them in the mandate.

(5) The defendants object to the disbursements for printing the "Memorandum Opposing Motion to Advance before the United States Supreme Court," amounting to $25.30; also "Motion to Consolidate and Re-assign Appeals before United States Supreme Court," amounting to $44.45; also "General Brief for Appellee on Appeal before United States Supreme Court," amounting — $428.13; also "Appellee's Brief on the Facts and Incidental Questions of Law before the United States Supreme Court," amounting to $10,130.35; also "Subject Index for above brief," amounting to $263.80; "Appellant's Brief before United States Supreme Court," amounting to [fol. 29] $81.80, for the reason that there is no rule permitting or allowing such disbursements, but, on the contrary, the decision of the United States Supreme Court in the case of ex parte Hughes, 114 U. S. 548, expressly holds that such disbursements are not taxable.

(6) Defendants object to the item under "stenographer's fees for testimony," "Copy of record for use of and furnished to the master, 47,760 folios at 40¢ per folio $19,104"—it appears that the charge per folio is excessive, more than the legal rate per folio. Furthermore, the defendants have paid a portion of the stenographer's fees, as will be more clearly shown by the attached vouchers showing such payment. At page 15475 of the record the master denied receiving a copy of the record.

"Mr. O'Brien: Well, it is in the record and you have been getting a copy of the record.

The Master: No, I have not had a copy of the record and I have not read Mr. Little's testimony."

This item would not be taxable in the State courts of the State of New York, and there is no rule of this court allowing such item to be taxed unless pursuant to an agreement between the parties in the action and no such agreement was made or entered into. Furthermore, under Equity Rule 50 the fees of a stenographer "shall be fixed by the court" and taxed ultimately as costs. In the above case the stenographer's fees have not thus far been fixed by the court in accordance with such rule.

(7) Defendants object to the item "Paid for Surety Bonds, premiums on bonds filed with Special Master, Richard Welling, in lieu of the deposit of impounded funds with him," amounting to $76,086, for the reasons (a) that there is no rule of this Court allowing any such disbursement as taxable; (b) the bonds filed with Special Master Richard Welling were not supersedeas or appeal bonds given pursuant [fol. 30] to any statute of this Court, but were allowed by this Court as a convenience to the complainant so as to permit it to withdraw the funds which the Court had directed to be impounded.

Dated, New York, May 9th, 1922.

Wilber W. Chambers, Solicitor for Defendant Charles D. Newton. John P. O'Brien, Corporation Counsel, Solicitor for Defendant Edward Swann.

[fol. 31] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER RETAXING COSTS—Filed May 1, 1923

This cause came on to be further heard before me at the January, 1923, Term of this Court, upon the motion of the defendants to retax costs, and also upon a rehearing directed by the Court, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed:

1. The item of $21,164.44, covering the printing of briefs for complainant before Special Master, and before this Court, and the Supreme Court of the United States, is not a taxable item of costs and is disallowed.

2. The amount to be taxed as fees of stenographer for reporting the testimony, should be at the rate of 20¢ per folio, instead of 25¢ per folio, and the said item is further reduced from $7,756 to $6,204.80.

3. The amount of $28,094.63, being amount at the rate of one-half of one per cent. paid by the complainant for the use of Liberty Bonds borrowed and deposited with the Special Master in lieu of cash or surety bond, pursuant to the final decree of the Court herein, is hereby disallowed.

[fols. 32 & 33] 4. The exceptions of the defendants to the allowance of $76,086 for premiums on bonds filed with Special Master Richard Welling in lieu of the deposit of impounded funds with him are hereby overruled.

5. The defendants shall receive credit for the sum of $113.37, the costs of the appeal from the order fixing the Master's allowance as provided in the mandate of the United States Supreme Court.

6. The said Bill of costs is returned to the Clerk of this Court with directions to retax the same in accordance with the provisions of this Order, and to insert the amount thereof, as retaxed together with the Clerk's fees in the judgment herein and to issue execution therefor to the complainant, as provided in the previous decree of this Court.

New York, April 30th, 1923.

Learned Hand, United States District Judge.

[File endorsement omitted.]

[fol. 34] District Court of the United States, Southern District of New York

[Title omitted]

Assignment of Errors—Filed July 30, 1923

Now come the defendants Charles D. Newton, as Attorney-General of the State of New York, and Edward Swann, District Attorney of the County of New York, State of New York, in the above entitled cause, and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 30th day of April, 1923, and the judgment entered thereon on the 27th day of July, 1923.

1. The Court erred in allowing the item of $76,086.00 paid as premiums on Surety Bonds filed with the Court to protect the consumers during the pendency of the action, for the reason that there is no equity rule which allows such a disbursement to be taxed against [fol. 35] the defendants, and it was an abuse of discretion on the part of the District Court in allowing the said sum.

2. That the condition of filing a Surety bond in lieu of cash was for the benefit of the complainant since it allowed it to use the excess moneys collected, prior to the final decree.

Dated, July 27, 1923.

George P. Nicholson, Corporation Counsel, Solicitor for Defendant Edward Swann, Office & Post Office Address Municipal Building, New York City. Wilber W. Chambers, Solicitor for Defendant Charles D. Newton, Capitol, Albany, N. Y.

[fol. 36] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed July 30, 1923

The petition of Charles D. Newton as Attorney-General of the State of New York and Edward Swann as District Attorney of the County of New York shows to this Court:

First. That Charles D. Newton is Attorney-General of the State of New York and Edward Swann is District Attorney of the County of New York, and defendants in this action.

Second. That this is a suit in equity to have declared unconstitutional Chapter 125 of the laws of 1906 of the State of New York, on the ground that the rate fixed by that act for gas sold to private consumers in The City of New York was confiscatory. The defendants filed their answers denying the material allegations of the bill of complaint.

[fol. 37] Third. The case was tried before a Special Master whose report was filed on the 6th day of May, 1920. Thereafter, the defendants filed exceptions to the Special Master's report which came on for hearing before the District Court. The opinion and decree of the District Court were filed on the 4th and 11th days of August, 1920. An appeal was thereafter taken to the Supreme Court of the United States which affirmed the decrees on March 6, 1922.

Fourth. A decree and order was entered in the above entitled cause of April 30th, 1923, wherein it was adjudged and decreed in part as follows:

"4. The exceptions of the defendants to the allowance of $76,086 for premiums on bonds filed with Special Master Richard Welling in lieu of the deposit of impounded funds with him are hereby overruled."

and a judgment for the sum of $129,693.97 was docketed on the 27th day of July, 1923.

Fifth. The above named defendants, Charles D. Newton, as Attorney-General of the State of New York, and Edward Swann as District Attorney of the County of New York, feeling aggrieved by the said decree entered in the above entitled cause on the 30th day of April, 1923 and the judgment entered thereon on the 27th day of July, 1923, do hereby appeal from said decree to the Supreme Court of United States for the reasons set forth in the assignment of errors herewith filed, and pray that their appeal be allowed and citation be issued as provided by law, and that a transcript of the record of the proceedings and documents upon which said decrees are based, duly authenticated, be sent to the Supreme Court of the United

[fol. 38] States, under the rules and regulations of such Court made and provided, and your petitioners pray that an order be made dispensing with security.

Dated, New York, July 27, 1923.

Wilber W. Chambers, Solicitor for Defendant Charles D. Newton, Attorney-General of the State of New York. George P. Nicholson, Solicitor for Defendant Edward Swann, District Attorney of New York County.

Appeal allowed and bond to cover costs of appeal is dispensed with. Dated, New York, July 28, 1923.

Francis A. Winslow, U. S. D. J. A. E. J.

[fols. 39 & 40] CITATION—Filed July 30, 1923; omitted in printing

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[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME

Upon the annexed stipulation dated August 1st, 1923, it is Ordered and decreed that the time of the defendants within which to serve a precipe and make a return to the United States Supreme Court on appeal herein from the decree entered on the 30th day of April, 1923, and the judgment entered on the 27th day of July, 1923, be extended to and including the 25th day of September, 1923.

Francis A. Winslow, United States District Judge.

Endorsed: U. S. District Court, S. D. of N. Y., Filed Aug. 21, 1923.

[fol. 42] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Sept. 6, 1923

To the clerk of the above-named court:

You will please include in the transcript of the record on appeal by the defendants allowed July 28, 1923 the following papers

1. Bill of Costs with Notice of Taxation returnable before the Clerk on April 26, 1922.

2. Bill of Costs with Notice of Retaxation returnable on November 22, 1922 before Judge Learned Hand.

3. Affidavit of James A. Donnelly, verified May 8, 1922;

4. Defendants' objections to proposed Bill of Costs filed with Clerk on May 9, 1922.

5. Decree entered April 30, 1923.

[fol. 43] 6. Petition for appeal and the allowance thereof.

7. Defendants' Assignment of Errors;

8. Citation.

9. This præcipe.

Yours, etc., George P. Nicholson, Corporation Counsel, Solicitor for Defendant Edward Swann, Office and Post Office Address Municipal Building, New York City. Wilber W. Chambers, Solicitor for Defendant Charles D. Newton, Capitol, Albany, N. Y.

Service admitted.

[File endorsement omitted.]

[fol. 44] UNITED STATES OF AMERICA,
Southern District of New York, ss:

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York this twentieth day of September, in the year of our Lord one thousand nine hundred and twenty-three and of the independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk. [Seal of the District Court of the United States, Southern District of N. Y.]

[fol. 45] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AND ADDITION TO RECORD—Filed Nov. 6, 1923

It it hereby stipulated, consented and agreed that the following papers in the above entitled action, to wit:

(a) Judgment and Decree and Opinion of Judge Learned Hand dated August 11, 1920.

(b) Opinion of Judge Learned Hand, dated March 28, 1923.

(c) Judgment entered July 27, 1923.

(d) This stipulation,

be added to and made a part of the record on appeal to the United States Supreme Court in the appeal taken by the defendants Charles D. Newton, as Attorney-General and Edward Swann, as District Attorney from the decree and judgment entered herein on the 30th day of April, 1923 and the 27th day of July, 1923, respectively, and it is further

Stipulated, consented and agreed that the copies of the foregoing papers hereto attached and made a part of this stipulation are true and correct copies of the originals of said papers on file in the [fol. 46] office of the Clerk of this Court in the above-entitled action.

Dated, New York, October 24, 1923.

Shearman & Sterling, Solicitors for Complainant. Wilber W. Chambers, Solicitors for Defendant Charles D. Newton. George P. Nicholson, Solicitor for Defendant Edward Swann.

[fol. 47] "A."

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

SUPPLEMENTAL OPINION ON MOTION TO MODIFY THE DECREE AND STAY

LEARNED HAND, D. J.: The plaintiff now moves to modify the decree of August 4, 1920, in three particulars: first, the provision for depositing the excess over eighty cents impounded; second, the "retroactive" effect of the new rate when fixed, third, the absence of findings. It also moves to amend the stay by a provision seeking to expedite the appeal.

Provisions for Deposit of Moneys Impounded

The plaintiff urges with force, I think, that to impound all the moneys over eighty cents for a period perhaps of a year will cause loss both to itself and to the consumers. It suggests that it have the [fol. 48] right to substitute adequate securities. The best that the special master can get on the deposits is probably three and a quarter per cent; the plaintiff if required to finance its temporary requirements must pay much more, it says fourteen per cent. In any case it will sustain a loss which will profit no one but the banks, so far as appears. I see no advantage in insisting upon impounding the

moneys if adequate security can be otherwise provided. I shall therefore modify the decree by allowing the plaintiff to deposit with the master in lieu of cash Liberty Bonds taken at their market value, or any other bonds which are a proper investment by savings banks in New York. These may be deposited with the special master originally or money already deposited may be drawn out from the banks upon substituting such bonds. The special master will be charged with the duty of calling upon the plaintiff for more bonds whenever their value equals that of the cash for which they are a substitute. In order to avoid repeated calls for such security I have therefore provided that the plaintiff shall in each case originally deposit one hundred and three per cent of the cash and that when their market value is equal to the cash he shall call upon the plaintiff to deposit additional bonds up to one hundred and three per cent of that cash. The interest upon these bonds accruing during the period of his possession shall be a part of the fund.

Also I allow the plaintiff to substitute surety company bonds for cash or to withdraw cash by giving such bonds, on the following conditions: No single company shall give a larger bond than $500,000 or more than one bond. The bond must secure not only the cash for [fol. 49] which it is substituted but interest at seven per cent during the period of its existence, which is to be part of the funds. The plaintiff must be a party to all such bonds and the surety company one of those recognized by the rules of this court. Provision must be made for the possibility of delays and extensions of time. I have required a substantial rate of interest because the plaintiff will be in effect using the consumers' money. On the one hand the consumer profits by getting more than he could from the banks, on the other the plaintiff profits by being relieved from high rates of interest. The rate at which the plaintiff has sold its bonds is seven per cent and on short financing the rates are much higher. I think that seven per cent should be the rate, even though the plaintiff must pay a premium to get the bond; it will recover back all that the consumers are not eventually entitled to. In result, if I take the plaintiff at its word, the opportunity will remain favorable to its acceptance. Such bonds ought not to exceed two-thirds of the total payments required.

The Conditions Imposed upon the Injunction

The second point urged is that I have exceeded my jurisdiction by imposing as a condition upon the continuance of the injunction that the fund deposited as security shall be distributed retroactively in accordance with the new rate when promulgated. The argument is that by so doing I have in effect assumed the power of the New York Legislature and during this period have substituted a rate of my own making where no rate existed. Of course if I were to try to impose [fol. 50] any such rate by any sanction other than the inducement offered by the injunction, this would be clearly true; it is equally clear that the only sanction is the injunction. If the plaintiff were absolutely entitled to an injunction as soon as the rate became confiscatory, it would also be true that the conditions I impose are un-

lawful. The plaintiff is not, however, absolutely entitled to an injunction, it is an equitable remedy and may be refused except on equitable conditions (Waldon v. Bolley, 14 Pet. 156, 164); the rule is of course most ancient and of the widest application. It has in effect been imposed in very similar circumstances (State R. R. Tax cases, 92 U. S. 575; Cummings v. Natl. Bank, 101 U. S. 163; People's National Bank v. Marye, 191 U. S. 272, 282-288). Norwood v. Baker, 177 U. S. 269, 291-294, special assessment case, is perhaps to the contrary in effect, but only because the authorities were free to make the proper assessment. It is analogous to the situation here if the Public Service Commission had now jurisdiction to make a rate. In the other cases the taxpayer who assailed the validity of the rate was obliged to pay the proper amount of the tax, in advance, as a condition of relief. In one sense these cases go further than the decree already entered herein, since they involve an assessment and levy by the court itself. In another perhaps they do not go so far, because there is now no law applicable to the plaintiff.

If the plaintiff is right I cannot limit the rate charged in any way. Once the statute is in abeyance its rights are unregulated altogether. This is contrary to the practice, at least in this District, of fixing a [fol. 51] rate pendente lite. The court must have as little jurisdiction to assume legislative prerogatives on application for temporary injunction, as on final decree. If the plaintiff's argument is good at all, it requires me to free it from all limitation as soon as the statute is found confiscatory. That argument proves too much.

There is no doubt that viewed as power alone, I might absolutely fix a rate as a condition of granting any injunction, and it makes no difference whether that rate lasted six months or six years. Any other and lower rate fixed by the State would of course in effect supersede it, but the condition of the injunction would continue to be legal. If the plaintiff chose to disregard it, it would suffer nothing but the loss of the *un*junction. It would then have to deal with the State authorities. That rate would be as good if fixed in a final decree as if fixed pendente lite or pending an appeal. But the question of power is one, recognize that the condition I have imposed is new, but it seems to me the minimal interference with the functions of the State as the rate-making body. The jurisdiction to suspend rates is at best somewhat invidious, and should be limited so far as possible to constitutional requirements as they now exist. Generally there is in existence a body which can at once assume jurisdiction; that will in such cases serve, but here it will not. Given this circumstance no better way occurs to me to limit the interference of this court with the action of the lawful authorities.

The plaintiff, however, appeals a little in misericordia; it says that having suffered several lean years it should be allowed a short period of milk and honey. The presupposition is that the rate when fixed [fol. 52] will be inadequate. Perhaps so, but it is scarcely an argument to which as a judge, and especially a Federal judge, I ought to listen. Within the limits which the Supreme Court has laid down I suppose the Legislature of New York may grant rates which will give questionable inducement to public service companies.

They have the power, and if its exercise prove impolitic, judges have nothing to say. The new rate when established must be enough under the rules or it will be again invalid; short of that it will stand. One may say, if one likes that form of statement, that it must be presumed adequate till the contrary appears.

I decline to change this feature of the decree.

Incorporation of Findings in the Decree

I have already considered this question, but the plaintiff is very insistent that some disposition should be made of the exceptions. In Oliver v. Platt, 3 How. 333, the decree did not dispose of the exceptions and Justice Story ignored the defect. In Kelsey v. Hobby, 16 Pet. 269, 276, the court held that where the matter was not of an exact sum due and all the evidence was in the record, it was not improper to confirm the report as a whole. A distinction should be drawn between the case at bar and one like Kimberly v. Arms (129 U. S. 512, 523-525), where the reference was of all the issues on consent and to hear and determine, when the findings are well-nigh conclusive. In the case at bar the reference was not on consent—though without objection—and it was only advisory in [fol. 53] any case.* In such cases "the report has no legal sanction and no further weight than such as attaches to it by reason of the fact that it may embody the researches and conclusions of an intelligent master" (Street Fed. Eq. Prac., §1516). It is, therefore, really of no consequence to dispose of the exceptions for these reasons and quite independently of the fact that this is a rate-case.

However, the point is doubtful and rather than leave it open to any difficulty on appeal I have in the amended decree confirmed specifically all these findings which I mean to confirm, and have declared that the other parts of the report are to be deemed superseded by my opinion. This can leave no doubt whatever as to what parts of the report I mean to stand. Unless I were to make findings in the declaratory part of the decree, which is never necessary (Street Op. Cit., §1964), I could not do more than refer to the opinion, which I have done.

I would not be understood to disagree with the master in so far as I have not confirmed his report. Our difference resulted from the fact that I bore much more heavily than he against the plaintiff. This might not have been a feasible disposition of the case, had the result been more doubtful. I have generally, though not always, felt justified in making conclusions not based upon the actual facts, but upon the least allowance which could fairly be taken for the various items. Obviously a difference between my re-

*The order read that the special master was "to take all of the testimony and evidence respecting the issues herein, make all needed computations and fully find the facts; but nothing herein contained shall be construed as meaning that the special master's findings of fact shall be final, but only that he shall find the facts for the purpose of aiding the court and making his recommendations."

[fol. 54] sults and the master's does not indicate that I should not agree with him, but only that I followed a different plan in dealing with the case. As it is always proper for the court to make its own findings (Henderson's Chancery Practice, 487), it becomes unnecessary to do more. As now drawn I think the decree is certainly open to no procedural challenge.

Stay Pending Appeal

I have introduced the provision suggested by the plaintiff in the stay. Perhaps it is not important, but it may help expedite the appeal.

I file herewith an amended decree and an amended stay.

August 11th, 1920.

Learned Hand, D. J.

[fol. 55] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AMENDED DECREE

This cause came on to be further heard at the August, 1920, Term of this court and was argued by counsel; and thereupon, upon consideration thereof, it is

Ordered, adjudged and d-creed that the decree of this court hitherto entered herein on the fourth day of August, 1920, be and the same hereby is amended so as to read as follows:

[fol. 56] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

This cause came on to be further heard at the July, 1920, Term of this court and was argued by counsel and thereupon, upon consideration thereof, it is

(1) Ordered, adjudged and decreed that the exceptions to the following numbered findings of the special master in his report proper filed herein May 6, 1920, are overruled:

One, two, three, four, five, modified by adding after the words "constituent companies," the words, "excepting certain expired rights to open streets for new mains," six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen substituting for the phrase, "have been kept in conformity with said rules and regulations" the phrase, "have been kept in substantian conformity with said rules and regulations," nineteen, twenty. [fol. 57] twenty-one, twenty-two twenty-five, twenty-six, twenty-eight, twen-y-nine, thirty-three, forty, forty-one, forty-three, forty-

five, forty-six, forty-eight, fifty, fifty-two, fifty-three substituting for the phrase, "have included in lieu thereof one-half of the additional investment required for the new water-gas unit," the phrase, "have included in lieu thereof and of the Fourteenth and Forty-second Street plants the whole of the additional investment required for the new water-gas unit," sixty-two modified by striking out the words, "showing a net profit with complainant company as of September, 1919, of not more than 4.73 per thousand cubic feet of gas sold," sixty-six, sixty-seven, sixty-eight, seventy-one, seventy-five, seventy-seven. And it is

(2) Further ordered, adjudged and decreed that the other exceptions to the report of said master and to his opinion as incorporated in his report are sustained, and that there are substituted therefor as findings of fact and law the findings set forth in the opinion of Learned Hand, D. J., filed herein on August fourth, 1920. And it is

(3) Further ordered, adjudged and decreed that Chapter 125 of the Laws of 1906 of the State of New York in so far as it prohibits the plaintiff herein from charging or receiving more than eighty cents per thousand cubic feet for the sale of gas in the Borough of Manhattan has been since January first, 1918, and now is confiscatory, and that said law deprives the plaintiff of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States. And it is

[fol. 58] (4) Further ordered, adjudged and decreed that the said law since January first, 1918, has been and now is invalid, as violative of said Amendment, that the plaintiff has no adequate remedy at law for any injury resulting from the enforcement of said law except by injunction, and that it is entitled to the relief hereinafter prescribed. And it is

(5) Further ordered, adjudged and decreed that the defendants, Charles D. Newton, as Attorney General of the State of New York, Edward Swann, as District Attorney of the County of New York, and Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, their successors, agents, servants and employees, be, and each of them hereby is, restrained for a period of five years from the date of the entry of this decree from suing for any penalty or forfeiture described in Chapter 125 of the Laws of 1906, or from in any other way enforcing, or attempting to enforce, the said Act, or from taking any action under the Public Service Commission Law to enforce said Act; and it is

(6) Further ordered, adjudged and decreed, as a condition of the continuance of the injunction hereinbefore granted, that until March first, 1921, or until the earlier promulgation of a gas-rate applicable to the plaintiff by some competent authority of the State of New York, the plaintiff shall neither charge nor collect for the sale of gas in the City of New York more than the sum of One dollar and twenty cents per thousand cubic feet. And it is

(7) Further ordered, adjudged and decreed as a further condi-[fol. 59] tion upon the continuance of said injunction that until March first, 1921, or until the earlier promulgation of such gas rate by such authority the plaintiff shall on the fifteenth day of August, 1920, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq. (who is hereby appointed special master for that purpose), out of all moneys collected by it for sale of gas in the City of New York all sums in excess of eighty cents. And it is

(8) Further ordered, adjudged and decreed that the said special master shall deposit all moneys so paid to him, equally in accounts in his name as special master in the New York Trust Company, the United States Mortgage & Trust Company, and the Title Guarantee & Trust Company at such interest as he can best obtain, to be withdrawn therefrom only upon order of this court. And it is

(9) Further ordered, adjudged and decreed that the said special master shall hold said moneys until March first, 1921, or until the earlier promulgation of such rate, as aforesaid, and upon the earlier promulgation of such rate the said special master shall on order distribute the moneys so collected with accrued interest, in accordance with such rate as though the same had been in effect from the date of the entry of this decree; but if no such rate shall have been promulgated on or before March first, 1921, then he shall pay over the sums so collected with accrued interest to the plaintiff. The said special master in either case to retain therefrom his expenses and allowances when fixed by the court. And it is

(10) Further ordered, adjudged and decreed that instead of making any payment or part payment to said special master in cash here-[fol. 60] inbefore required, the plaintiff may at its option deposit with said special master Liberty Bonds of the United States or any other bonds in which savings banks are authorized to invest under the laws of the State of New York of a market value at the time of such deposit equal to one hundred and three per cent of the payment or part payment for which they are substituted; said bonds to be held by said special master subject to the provisions in this decree marked (9), both as to their principal and any interest accruing thereon during the period of his possession, said interest to be apportioned per diem. And whenever the market value (less subsequently accrued interest) of such bonds shall be no more than the cash for which they are a substitute, the said special master is hereby directed to call upon the plaintiff to deposit with him additional bonds sufficient to make up one hundred and three per cent of such cash, and such deposit shall be a condition upon the further continuance of this injunction. And it is

(11) Further ordered, adjudged and decreed that the plaintiff may at any time withdraw on order any cash previously paid to the special master upon the deposit with said special master of such bonds to be held by him under the same terms as are applicable to the deposit of bonds in place of any original payment. And it is

(12) Further ordered, adjudged and decreed that instead of making any payment or part payment to said special master in cash hereinbefore required, the plaintff may, at its option, file in court on order a surety bond in place of the same upon the following [fol. 61] terms and conditions: All such bonds shall be executed by the plaintiff and by a surety company authorized to give bonds by the rules of this court. No surety company shall execute more than one bond and that in a sum no greater than $500,000. All bonds shall be conditioned in the payment of the sum in cash for which they are a substitute together with seven per cent thereon until the time of payment. All such bonds shall be further conditioned upon the payment of the principal and interest thereof in accordance with the provisions of this decree marked (9) or of any future modification thereof, and shall contain a provision that the same shall continue*d* valid notwithstanding any future extension by decree of the period hereinbefore mentioned within which a new rate may be promulgated, and notwithstanding any further extension of payment resulting from any stay during the pendency of any appeal herein, and an- other modification of this decree or of any stay in particular. Such bonds in the aggregate shall not at any time exceed two-thirds of the total payments then required by the terms of this decree. And it is

(13) Further ordered, adjudged and decreed that the plaintiff may on order at any time withdraw any moneys previously paid to the said special master upon filing any surety bond drawn as hereinbefore described. And it is

(14) Further ordered, adjudged and decreed that the foregoing provisions of this decree marked (9), (10), (11), (12), and (13) shall apply to all moneys collected by the plaintiff between July 1, [fol. 62] 1920, and August 5, 1920, under the temporary injunction heretofore issued herein by the statutory court on June 28, 1920. And it is

(15) Further ordered, adjudged and decreed that at any time while the injunction hereinbefore granted shall remain in force, any party hereto, including the successor in office of any of the defendants, may apply upon notice at the foot hereof to vacate, modify, or extend the foregoing injunction because of any change of circumstances since the entry hereof; or for any additional relief to which he or it may become entitled. And it is

(16) Further ordered, adjudged and decreed that the plaintiff do recover its costs and disbursements when duly taxed of the defendants to be borne equally upon them, and that the allowance and expenses of Abraham S. Gilbert, Esq., the special master appointed to hear and report herein, shall be fixed by the court upon motion made by any party hereto, or by the said special master, and shall be paid by the defendants equally, or upon their default, then out of the cash, bonds, or surety bonds hereinbefore described.

August 4, 1920.

Learned Hand, U. S. D. J.

Learned Hand, U. S. D. J.

August 11th, 1920.

[fol. 63] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AMENDED STAY

This cause came on to be further heard at the August, 1920, Term of this court, and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the stay herein entered on the fourth day of August, 1920, be and the same hereby is amended so as to read as follows:

[fol. 64] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

This cause came on to be further heard at the July, 1920, Term of this court and was argued by counsel and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that in case the defendants or any one of them shall within thirty days after the entry of final decree herein appeal therefrom to the Supreme Court of the United States, then and in that case the conditions imposed upon the continuance of the injunction in said decree shall continue until the determination of such appeal and the special master appointed in said decree shall not distribute the moneys or bonds collected by him until such determination, and the surety bonds if any given shall continue in effect until the same time, notwithstanding any extension of time given to prosecute said appeal.

[fol. 65] And it is

Further ordered, adjudged and decreed that all moneys collected by, or bonds deposited with, said special master and the proceeds of any surety bonds filed herein, in accordance with such decree shall at all times be held subject to the order of this court upon mandate of the Supreme Court of the United States. And it is

Further ordered, adjudged and decreed that this order is made, and shall continue in effect only upon the condition that the defendants, and each of them, shall perfect and prosecute any such appeal, and print and file the record and all necessary papers to that end, promptly and without delay; and in the event that the plaintiff is at any time of the opinion that the perfecting of such appeal, the filing of the record, briefs, or other papers, or the bringing on of the appeal for argument, is being unreasonably and unnecessarily delayed by the defendants or any of them, it may apply to this court, upon notice, for such a modification of this order or other action as may be warranted in the premises.

August 4, 1920.

Learned Hand, U. S. D. J. Learned Hand, U. S. D. J. August 11th, 1920.

[fol. 66] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

OPINION ON MOTION TO ALLOW CERTAIN CLAIMS

This is a motion to allow certain claims in the plaintiff's bill of costs in a suit in equity. The plaintiff filed a bill in equity to restrain the public officials of the State and County of New York from enforcing a statute limiting the price of gas in the City of New York. The plaintiff won but pending an appeal the decree of injunction was made conditional on the plaintiff's depositing all sums collected in excess of the statutory rate with a special master. The plaintiff later got leave to substitute surety bonds instead of cash, and later still, Liberty bonds. The appeal being decided in the plaintiff's favor, it taxed the premiums on the surety bonds, as part of its bill of costs and these were allowed. The Liberty bonds deposited it procured in part from its own treasury and in part from the treasuries of allied companies, all, or substantially all, of whose shares it owned. There was a profitable use for these bonds, as appears in the opinion, and the plaintiff paid its allied companies one-half of one per cent a year for the bonds which it borrowed for them, that being the value of the use to which they could put them. This item and the loss of its own profit on those of its own bonds which it used, it did not include in its original bill of costs, and now seeks to have inserted by motion.

[fol. 67] Jacob H. Goetz for the motion.
Harry Hertzoff opposed.

LEARNED HAND, D. J.: Before the amended admiralty rules fixed the practise, it had been the custom in this Circuit to allow as costs premiums on stipulations given to release vessels from arrest, The Voland, 181 Fed. R. 643 (C. C. A. S.). The Hursidale, 171 Fed. R. 607, The John D. Dailey, 168 Fed. R. 642. Elsewhere the authorities were not unanimous, but in such matters we follow our local custom. I have been unable to get much help out of the books as to the rule in suits in equity. Judge Lacombe in Edison v. American Mut. Co., 117 Fed. R. 192, allowed premiums paid on a supersedeas bond, in what I take to have been a suit in equity, but that is the only case in this Circuit which I can find. It has, however, been our uniform custom to allow such items in all sides of this court for the fourteen years that I have sat here, and no distinction has ever been drawn between law, equity or admiralty. I think that the decisions on the admiralty side before the rule are competent authority if anything more than custom be necessary. Therefore I shall let the taxation stand as respects the premiums paid on surety bonds.

The other claim of the plaintiff is not the same. After depositing with the master surety bonds in large amounts the plaintiff thought that it should be allowed to substitute Liberty bonds, and did so,

after I had approved. It now claims the amounts which it paid to its allied companies which lent these bonds, and equal sums for those of its own bonds which it deposited. In support of these claims it alleges that there was a financial value to the use of these bonds, which it was the custom to lend to the National City Bank at one-half of one per cent per annum. Thus, considering for a moment the plaintiff's own bonds, it was deprived of a profit which it would otherwise have [fol. 68] got while they remained out on loan.

The logic of this is sound enough; the plaintiff is the poorer by what it has lost. But in such matters logic counts for little and custom much. No one has, so far as I know, ever suggested before that losses of profits involved in the incidents of a law-suit are properly taxable as costs. In this country there has never been any effort to make whole the winning party for his outlay in a suit. What is allowed is fixed by convention or by express law or rule. Whether it should be so is another matter, not for me to determine. I am altogether confident that this claim is quite beyond any allowance ever made or the principle of any such allowance.

The amounts actually paid for the use of Liberty bonds of the plaintiff's allied companies fall within the same reasoning. If the plaintiff had paid onehalf of one per cent. to a genuinely independent company, more might be said, though that would be an extension of any custom heretofore prevailing. That question, however, I pass, because in my judgment it does not arise. The plaintiff was the owner of all the stock of the allied lending companies, with such trivial exceptions as need not be considered. The sums which it paid to them enriched its own holdings in those shares by exactly their amount, and in substance the situation is precisely the same as though it had used its own bonds and lost the corresponding profit. Of course I know that for many purposes these corporations are independent, that third persons deal with them as separate entities which they are. But here we have a case in which to allow the recovery is to give with one hand what I have taken away with the other; to allow the shares held by the plaintiff to be enriched, when I have declined to enrich its treasury directly. To do that appears to me to contradict the theory on which I deny the sum to the [fol. 69] plaintiff.

Therefore, I decline to retax these disbursements, ignoring the question whether the failure of the plaintiff originally to include them in its bill of costs concludes it. The motion is denied.

The retaxation in the case of the subsidiary companies will similarly excise any payments made to the Consolidated.

L. H., D. J. March 28, 1923.

[fol. 70] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

[Title omitted]

JUDGMENT

The complainant in the above entitled cause filed its bill of complaint on the 16th day of January, 1919 and the writ of subpœna was thereupon issued and returned personally served.

Appearances were duly extended for the defendants as follows: For Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke, constituting the Public Service Commission of the State of New York, First District, by Godfrey Goldmark; for Charles D. Newton as Attorney General of the State of New York by Wilber W. Chambers, Deputy Attorney General; for Edward Swann as District Attorney of the County of New York, State of New York by Robert C. Taylor.

[fol. 71] On May 16, 1919 an order was filed substituting William P. Burr, Corporation Counsel of the City of New York as solicitor for the defendant Edward Swann, District Attorney of the County of New York in place of Robert C. Taylor and on June 10, 1919 motion of plaintiff to set aside said order was denied.

On May 13, 1919 an order was filed substituting Lewis Nixon constituting the Public Service Commission of the State of New York, First District as party defendant in place of defendants Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke constituting the Public Service Commission of the State of New York, First District.

On March 3, 1919 an order was filed denying petition of the City of New York for leave to intervene as a party defendant and on May 28, 1919 an order was filed denying motion by the City of New York to resettle said order of March 3, 1919. On May 29, 1919 an appeal was taken from said orders to the United States Circuit Court of Appeals for the Second Circuit and the transcript of record on said appeals was on June 7, 1919 certified to said Court.

On July 18, 1919 the mandate of the Circuit Court of Appeals was filed upon which on July 29, 1919 the decree of this Court was filed and entered affirming the order filed March 3, 1919 and adjudging that the complainant recover of the City of New York the sum of $25.25 costs of said Circuit Court of Appeals. On September 2, 1919 an order was filed denying motion by the City of New York to stay proceeding pending the determination of the Supreme Court of the United States upon an application for a writ of Certiorari to review said mandate.

[fol. 72] On February 8 and 17 and May 24, 1919 thereafter answers to the bill of complaint were filed the same being hereunto annexed.

On May 15, 1919 an order was filed denying motion of the defendant the District Attorney of the County of New York to dismiss the complaint.

On May 16, 1919 an order was filed appointing Abraham S. Gilbert, Esq. as special master to take testimony and evidence, make needed computation and find the facts and make report to this Court, said special master on June 20, 1919 filed his oath of office. On May 6, 1920 filed his report and on June 4, 1920 filed his certificate as to allowance.

Exceptions to said special master's report were filed by the defendants on May 25, 1920.

On June 29, 1920 a decree of said Court was filed and entered in favor of the plaintiff granting a temporary injunction restraining the defendants upon the conditions among others (a) that complainant beginning July 1, 1920 and during the pendency of the injunction shall furnish gas to consumers at a price not exceeding one dollar per 1,000 cubic feet; (b) that complainant shall pay the difference between 80 cents and the price collected by it per 1,000 cubic feet to Richard A. Welling, Esq., who is appointed Special Master for the purpose of depositing same in the depositories designated and applying same in accordance with the final decree.

On July 27, 1920 defendants appealed to the Supreme Court of the United States from said decree, but no transcript of record on appeal was certified.

[fol. 73] On August 4th and 11th, 1920 the decree and amended decree of this Court were filed and entered in favor of the plaintiff, ruling on the exceptions to the special master's report and modifying said report and adjudging that Chapter 125 of the Laws of 1906 of the State of New York is invalid in certain respects and enjoining defendants for a period of five years or until determination of any appeal from this decree upon certain conditions and impounding with Richard A. Welling, Esq., special master, certain excess sums collected by plaintiff or securities or surety bonds in lieu of such sums and adjudging that any of the parties hereto may at any time apply to said Court for an order vacating or modifying the terms of the decree and that plaintiff recover costs and disbursements when taxed, of the defendants to be borne equally by them. An appeal was taken from said decrees on September 9, 1920 by defendants and on November 10, 1920 by complainant and the transcript of record on said appeal was thereafter certified to the United States Supreme Court.

On February 28, 1921 a decree of this Court was filed and entered denying motion of the defendants to modify in certain respects the decree filed August 4, 1920 as amended and further amending said decree. On March 7, 1921 complainant appealed to the Supreme Court of the United States from the said decree and on March 6, 1921 the transcript of record on said appeal was certified.

On June 23, 1921 a decree of this Court was filed and entered amending the decree filed August 4, 1920 as amended, by limiting the amount of bonds which special master Richard A. Welling, Esq. may accept from any one surety company.

[fol. 74] On April 2, 1921 an order was filed awarding $6,500 to Richard A. Welling, special master, as compensation on account.

On March 15, 1922 said special master Richard A. Welling filed his report.

On December 7th and 13th, 1921 the decree and amended decree of this Court were filed and entered fixing the compensation of A. S. Gilbert as special master and adjudging that the same shall be paid in the first instance by the complainant and shall be taxed as costs to be paid equally by the defendants as provided in the final decree herein. On January 16, 1922 defendants appealed to the Supreme Court of the United States from said decrees and the transcript of record on said appeal was thereafter certified to the Supreme Court. On June 20, 1922 the mandate of the United States Supreme Court was filed reversing said decrees, costs to be paid by appellants with right to claim credit therefor upon any judgment hereafter entered against them on account of the master's compensation and that said Consolidated Gas Company of New York recover against the defendants for its costs herein expended and remanding cause to this Court for further proceedings, whereupon on June 29, 1922 the decree of this Court was filed and entered adjudging that the compensation of A. S. Gilbert as special master herein to the extent of $28,750, together with the sum of $655.38 the necessary disbursements of the master be taxed as costs in this suit to be paid equally by the defendants.

On March 15, 1922 there were filed three mandates of the Supreme Court of the United States (1) affirming the decree of this Court [fol. 75] filed February 28, 1921 with costs to the defendants, (2) modifying the decrees filed August 4th and 11th, 1920 staying defendants and as so modified affirming same with $20 costs to the complainant, (3) modifying the final and supplemental final decrees filed August 4th and 11th, 1920 and as so modified affirming same with $362.40 costs to the complainant.

On March 15, 1922 the decree of this Court upon said mandates was filed and entered (1) making the judgment of the United States Supreme Court the judgment of this Court; (2) amending he final decree of this Court filed August 11, 1920 as amended by the decree filed February 28, 1921 by making it a condition upon the Continuance of the injunction granted that plaintiff shall until determination of any appeal from said amended decrees pay to Richard A. Welling, Esq. all excess moneys collected; (3) amending said decrees by providing that the said special master shall hold all moneys collected by him until the determination by the Supreme Court of the United States of any appeal by the defendants from the final judgment therein and in case the final judgment entered therein upon the mandate of the Supreme Court of the United States sustain as to the plaintiff Gas Company the invalidity of Chapter 125 of the Laws of 1906 the said special master shall pay over the same to the plaintiff with accrued interest; (4) adjudging that the special master shall pay and deliver over to the complainant all funds, bonds or other securities, remaining in his hands or deposited with him by said complainant, pursuant to the provision of the decrees for temporary injunction filed June 28, 1920 and of the final decree filed August [fol. 76] 11, 1920; (5) adjudging that said special master Richard A. Welling, Esq. is authorized to retain as compensation the sum of $15,000 (of which $6,500 has already been paid on account) and for disbursements the sum of $2,330.06; (6) adjudging that all

surety bonds filed with the clerk of this Court by the complainant be cancelled and released and the surety thereon be discharged from any and all further liability.

On May 17, 1922 defendants appeal from said decree filed March 15, 1922 but no transcript of record on said appeal was ever certified.

And the costs having been retaxed by the Clerk in accordance with the orders annexed hereto, at the sum of One Hundred Twenty-nine Thousand, Six Hundred Ninety-three and 97/100 ($129,693.97) Dollars, the process, pleadings and decrees together with other papers filed in said cause, are duly annexed hereunto.

Wherefore let the said complainant, the Consolidated Gas Company of New York, recover of said defendants, Charles D. Newton, as Attorney General of the State of New York, Edward Swann, as District Attorney for the County of New York, State of New York, and Lewis Nixon, constituting the Public Service Commission of the State of New York, the sum of One Hundred Twenty-nine Thousand, Six Hundred Ninety-three and 97/100 ($129,693.97) Dollars, the costs and charges as taxed.

Signed and enrolled this 27th day of July A. D. 1923.

Alex. Gilchrist, Jr., Clerk.

[fols. 77] UNITED STATES OF AMERICA,
Southern District of New York, ss:

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct supplemental transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this fifth day of November, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk. [Seal of the District Court of the United States, Southern District of N. Y.]

[fols. 78 & 79] [File endorsements omitted.]

Endorsed on cover: File No. 29,875. S. New York D. C. U. S. Term No. 565. Charles D. Newton, as attorney general of the State of New York; Edward Swann, as district attorney of the county of New York, et al., appellants, vs. Consolidated Gas Company of New York. Filed September 22d, 1923. File No. 29,875.

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Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 565.

CHARLES D. NEWTON, as Attorney-General of the State of New York; and EDWARD SWANN, as District Attorney of New York County, *et al.*,

Appellants,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK,

Appellee.

Brief on Behalf of the Appellants.

This is an appeal by the above named appellants from part of a decree made in this cause and entered in the office of the Clerk of the United States District Court, Southern District of New York, on the 30th day of April, 1923, which reads as follows:

> "4. The exceptions of the defendants to the allowance of $76,086 for premiums on bonds filed with Special Master Richard Welling in lieu of the deposit of impounded funds with him are hereby overruled" (Rec., p. 21).

and also from a judgment for the sum of $129,693.97 which was entered thereafter on the 27th day of July, 1923 (Rec., pp. 22-39).

The appeal arises out of a suit commenced in the United States District Court for the Southern District of New York to set aside as unconstitutional Chapter 125 of the Laws of 1906, which fixed the price at which gas was to be furnished to private consumers in the various boroughs in the City of New York.

The decree herein appealed from is supplemental to the decrees passed upon by this Court in Newton *vs.* Consolidated Gas Co. (258 U. S. 165, and in 259 U. S. 101), and was made pursuant to paragraph 16 of the decree there involved. That paragraph is as follows:

> "(16) Further ordered, adjudged and decreed that the plaintiff to recover its costs and disbursements when duly taxed of the defendants to be borne equally upon them, and that the allowance and expenses of Abraham S. Gilbert, Esq., the special master appointed to hear and report herein, shall be fixed by the Court upon motion made by any party hereto, or by the said special master, and shall be paid by the defendants equally, or upon their default, then out of the cash, bonds, or surety bonds hereinbefore described" (Rec., p. 32).

On March 6, 1922, this Court, affirming the decree of the lower court (258 U. S. 165), decided that the above statute was confiscatory.

A notice of taxation was thereafter served to have the Clerk tax the costs and disbursements

at a total amount of $192,607.28 (Rec., p. 1). This amount was reduced by $28,750, by reason of the reduction by this court, of the fees paid to the Special Master (259 U. S. 101); and also by the disallowance and reduction of several items.

The defendants moved to re-tax the costs before Hon. Learned Hand (Rec., p. 18), whose decree was entered on April 30, 1923, overruling the exceptions of the defendants as to the item of $76,086.00 and directing the Clerk to enter judgment which was done on July 27, 1923, in the sum of $129,693.97.

This appeal brings up the question as to the liability of the appellants for the premiums on Surety bonds, which were filed by the appellee, instead of cash, to cover the difference between the price of 80 cents allowed by Chapter 125 of Laws of 1906 and the amounts collected, pending the final determination by this Court.

This suit was brought to set aside the statute and the extraordinary relief of an injunction to prevent the public officers of the State from moving against the complainant was asked for in the prayer for relief.

The District Court in its opinion of February 28, 1921, said:

> "* * * It may be observed that if the plaintiff had chosen to await the action of the defendants it would have been free to charge and keep whatever it wished, the statutory rate having in fact become invalid. It was, however, not content with that course, but demanded the extraordinary relief of an injunction to prevent the defendants moving against it at all. In so doing it subjected it-

> self to all equitable conditions upon that relief, from which it could and can still at any moment be free by vacating the decree" (274 Fed. 986, 7).

The remedy pursued by the appellee in freeing itself from the statute and the relief demanded were solely within the discretion of the appellee; appellants had no part therein.

That Court imposed certain conditions upon granting the injunction, viz: the impounding of whatever moneys were collected from the consumers in excess of the statutory rate pending determination of the appeal to this Court.

The original decree of August 4, 1920 provided, among other things, as follows:

> "* * * The plaintiff shall, on the 15th day of August, 1920, and on the 15th day of each succeeding month, pay to Richard Welling, Esq., (who is hereby appointed Special Master for that purpose), out of all moneys collected by it for sale of gas in the City of New York, the following sums: All sums in excess of eighty cents collected from all consumers other than the City of New York: * * *" (Record, pp. 13, 14).

The appellee thereupon complained to the District Court of the conditions imposed upon it of impounding the cash with the Special Master, and asked to substitute other security and be allowed to withdraw the cash for its own use.

That motion was based upon the claim that the impounding of the cash would cause a loss to the gas company, that the substitution of other se-

curities would greatly benefit it on the one hand, and would not jeopardize the interests of the defendants on the other. That Court said in its opinion of August 11, 1920:

> "*Provision for Deposit of Moneys Impounded.*
>
> The plaintiff urges with force, I think, that to impound all the money over eighty cents for a period of perhaps of a year, will cause loss both to itself and to the consumers. It suggests that it have the right to substitute adequate securities. The best that the special master can get on the deposits is probably three and a quarter per cent; the plaintiff if required to finance its temporary requirements must pay much more, it says fourteen per cent. In any case it will sustain a loss which will profit no one but the banks, so far as appears. I see no advantage in insisting upon impounding the moneys if adequate security can be otherwise provided. I shall therefore modify the decree by allowing the plaintiff to deposit with the master in lieu of cash Liberty Bonds taken at their market value, or any other bonds which are a proper investment by savings banks in New York" (267 Fed. 272), (Rec., p. 25).

The Court also permitted it to file surety bonds under the following conditions:

> "Also I allow the plaintiff to substitute surety company bonds for cash to withdraw cash by giving such bonds, on the following

> conditions: No single company shall give a larger bond than $500,000 or more than one bond. The bond must secure not only the cash for which it is substituted but interest at seven per cent, during the period of its existence, which is to be part of the funds" (267 Fed. 272), (Rec., p. 26).

Appellants contended that the substitution of other securities was solely for the benefit and advantage of the appellee. The appellants asked that the cash be impounded with the Special Master and opposed the motion to substitute other security therefor, but the Court granted the relief asked for.

The courts do not seem to have passed upon the question whether amounts paid for surety bonds given for a similar purpose as herein, are a taxable item as a disbursement. At least we are unable to find any authority to sustain such a proposition.

The cases bearing upon the question whether premiums upon surety bonds are taxable, relate to appeal bonds and supersedeas bonds, or bonds given in admiralty cases to release a libeled vessel. None of these cases are analogous to the instant case. In the admiralty case, an unsuccessful attack and an unlawful retention of the vessel takes place, putting the defendant to considerable expense to gain the use of his vessel held as security for damages expected to be obtained in the action.

In the instant case there was no attack made upon the Consolidated Gas Company by the public officers putting it to any expense to release its

property unlawfully retained as security for damages.

A similar question arises in the following cases affecting other gas companies operating within the City of New York.

1. East River Gas Company of Long Island City.
2. The New York Mutual Gas Light Company.
3. Northern Union Gas Company.
4. Central Union Gas Company.
5. The Standard Gas Light Company of The City of New York.
6. New Amsterdam Gas Company.
7. Brooklyn Union Gas Company.
8. Flatbush Gas Company.

Appeals have been taken in the first six, whereas final judgments have not been entered in the last 2 cases.

The total amount involved in all of the cases is $141,131.00.

We contend, first: that the disbursement for premiums on surety bonds in the instant case was a needless and unnecessary expenditure, so far as the appellants were concerned. Second, The substitution of other surety for the cash impounded enured to the benefit of the appellee solely, and the appellants should not be taxed for a disbursement made solely for the benefit and advantage of the appellee.

POINT I.

This is a final order within the holdings of the decisions.

In Odell *vs.* Batterman, 223 Fed. Rep., 292, it was held:

> "Under the decisions an adjudication is a final appealable order if it involves the determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to appeal."

In Central Trust Company *vs.* United States Light and Heating Co., 233 Fed. Rep., 420, it was held that an order fixing counsel fees was final and appealable.

The Court said:

> "The order was final and conclusively adjudicated something over which the Court had jurisdiction and which arose in the progress of the litigation although distinct from the general subject of the suit."

In the very recent case of

> Georgia Railway & P. Co. *v.* Town of Decatur, 262 U. S., 432, 441,

Mr. Justice Sutherland, speaking for the Court, said:

> "While prior decisions on the subject of what constitutes a final judgment are not entirely harmonious, the rule is established that,

in order to give this court appellate jurisdiction, the judgment or decree 'must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered'— Bostwick *v.* Brinkerhoff, 106 U. S., 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15, and cases cited."

POINT II.

This Court has jurisdiction of the entire case and of all questions involved in it.

This appeal was taken directly to this Court from the decree of the District Court, Southern District of New York, because of the provisions of Section 238 of the Judicial Code, which provides in part as follows:

> "Appeals and writs of error may be taken from the District Court * * * direct to the Supreme Court in the following cases * * * and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

and

Section 128 of the Judicial Code which provides:

> "The Circuit Court of Appeals shall exercise jurisdiction to review by appeal or writ of error, final decisions in the District Court * * * in all cases other than those in which

> appeals and writs of error may be taken direct to the Supreme Court * * *."

This Court has held in a number of cases that where a constitutional question is involved, it will take the case to itself and decide all of the questions involved.

In Brolan *vs.* U. S., 236 U. S. 216, the Court said:

> "Our jurisdiction to directly review depends upon the constitutional question, since the other matters relied upon are as a general rule within the exclusive jurisdiction of the Circuit Court of Appeals * * * although if power to review attaches to the case because of the constitutional question, that authority gives rise to the duty to determine all the questions involved" (Burton *vs.* U. S., 196 U. S. 283; Williamson *vs.* U. S., 207 U. S. 425, at p. 432; Billings *vs.* U. S., 232 U. S. 261, at p. 276).

In the Williamson case, *supra,* the Court said:

> "If there be a constitutional question adequate to the exercise of jurisdiction the duty exists to review the whole case."

In Burton *vs.* United States, 196 U. S. 286, at 295, where a constitutional question was raised which, although not decided in favor of appellant, the Court said was not frivolous, it was held:

> "* * * the statute grants to this Court jurisdiction to issue the writ of error directly to the District Court, and then to decide the

case without being restricted to the constitutional question."

In Farmers Loan and Trust Company, 129 U. S., 206, the Circuit Court of Appeals made an order after the final judgment in the case and after an appeal had been taken to the Supreme Court and by a unanimous decision of this Court, it was held that this order was appealable. In that case Mr. Justice Bradley said:

> "In the present case the order complained of being final in the matter to which it relates, and being made since the final decree in the cause, and not reviewable on the appeal from that decree, it may be as well reviewed here as in any other way."

In Citizens Bank *v.* Cannon, 164 U. S. 319, at page 323, the Court said:

> "* * * As a general rule, an appeal will not lie in a matter of costs alone. But such appeals have been sustained in particular circumstances, as, for instance, where the costs have been directed to be paid out of a trust fund. In Trustees *v.* Greenough, 105 U. S. 527, this court said, through Mr. Justice Bradley, that the objection to an appeal on the ground of its being from a decree for costs only is untenable. * * * "

In, Ex Parte Hughes 114 U. S. 548 this court passed upon a question with reference to the taxation of Costs.

It seems to be settled that where an appeal or writ or error is taken direct to this Court under

subdivision 5 of said section 238 of the Judicial Code, this Court acquires jurisdiction, not only of the question specified in that section, but of all the questions involved in the entire case.

> Horner *vs.* United States, 143 U. S., 570 pp. 576-577.

In one of the appeals in connection with the litigation in question;

> City of New York *v.* Consolidated Gas Company, 253 U. S. 217,

Mr. Justice Day, speaking for the Court, at page 221, said:

> "* * * As the jurisdiction of the District Court was based upon constitutional grounds only, the case was not appealable to the Circuit Court of Appeals. * * *"

This Court has also taken jurisdiction in an appeal regarding the compensation of a Special Master in the instant case and which item as reduced by this Court is now in the Bill of Costs as taxed (Rec. p. 7; 259 U. S. 101).

POINT III.

The court had the right, in granting the injunction, to direct the impounding of the difference between the statutory rate and that allowed under the injunction.

In the original suit to have the 80 cent statute set aside, (Willcox *v.* Consolidated Gas Co. 146 Fed. 150, 156; 157 Fed. 849; 212 U. S. 19) an injunction was granted by the Circuit Court; Judge Lacombe said at page 156:

> "* * * This is an argument which has always appealed most strongly to Courts of Equity and there are abundant authorities to support the proposition that, pending the decision of a doubtful question, the *status quo,* proper security being exacted, should be preserved."

In granting the injunction upon terms, the court must have had in mind the fact that a similar injunction had been granted by the Circuit Court in the original suit to test this statute and the further fact that this Court had reversed the lower court and refused to hold the statute to be confiscatory.

The court's attention was also called to the fact that a large amount of money collected under that injunction had never been returned to the consumers and that $472,891.15 was still in the possession of the Company.

The District Court said (Rec., p. 27):

> "The plaintiff is not, however, absolutely entitled to an injunction, it is an equitable remedy and may be refused except on equitable conditions (Waldon *v.* Bolley, 14 Pet. 156, 164); the rule is of course most ancient and of the widest application. It has in effect been imposed in very similar circumstances (State R. R. Tax cases, 92 U. S. 575; Cummings *v.* Natl. Bank, 101 U. S. 163; People's National Bank *v.* Marye, 191 U. S. 272, 282-288). Norwood *v.* Baker, 177 U. S. 269, 291-294, special assessment case, is perhaps to the contrary in effect, but only because the authorities were free to make the proper assessment."

This Court, in affirming the decree in the present case, said:

> "It was within the court's discretion to grant the injunction upon terms and we cannot now say that the limitation upon charges amounted to abuse * * * Undoubtedly, after appeal the trial court may, if the purposes of justice require, preserve the *status quo* until decision by the appellate court. Hovey *v.* McDonald, 109 U. S. 150, 157." * * * (Newton *v.* Consolidated Gas Co., 258 U. S. 165, 177).

In,

Ex Parte Lincoln Gas Co. 256 U. S. 512,

this Court had before it a question which related to moneys collected in excess of a rate fixed by an ordinance, which was held to be valid.

The Gas Company in that case tried by every possible means to avoid the repayment to Con-

sumers of the sums which had been collected under the terms of the injunction.

The Company attempted by Mandamus, to prevent the District Court from assuming jurisdiction to effect the return of the excess collections.

Mr. Justice Pitney speaking for the Court said at p. 517, 518:

> "* * * The ordinance was intended to limit the gas rate for the benefit of the consumers; suit was brought against the municipality and its officers as the public representatives of the interests of the consumers; the restraining order and temporary injunction were intended for the very purpose of enabling the company to exact, pending the suit, rates in excess of those limited by the ordinance; the equitable duty to refund excess charges if the suit should fail was a duty owing to the consumers; and the form of the supersedeas bond recognized all this, and was particularly designed for their protection."

POINT IV.

There is no rule of this court authorizing or permitting such an item to be taxed as costs.

The question of taxable costs is covered by Sections 823 and 983 of the Revised Statutes.

Section 823 provides:

> "The following and no other compensation shall be taxed and allowed * * * except

in cases otherwise expressly provided by law."

Section 983 provides:

> "The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases whereby law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause."

The above sections should not be interpreted to give the right to tax the cost of obtaining surety bonds in a case such as the one in question.

We find no rule of this court which authorizes or permits the taxation of an item claimed to have been paid for premium on surety bonds, substituted as security in the place of the cash directed to be impounded by the court.

The District Court in its opinion says as follows (291 Fed. 704, 705, 706, at pages 705-6:

> "Before the amended admiralty rules fixed the practice, it had been the custom in this Circuit to allow as costs premiums on stipulations given to release vessels from arrest. *The Volund,* 181 Fed. 643 (C. C. A. 2), *The Hurstdale,* 171 Fed. 607, *The John D. Dailey,* 158 Fed. 642. Elsewhere the authorities were not unanimous, but in such matters we follow

> our local custom. I have been unable to get much help out of the books as to the rule in suits in equity. Judge Lacombe in Edison *v.* American Mut. Co., 117 Fed. 192, allowed premiums paid on a supersedeas bond, in what I take to have been a suit in equity, but that is the only case in this Circuit which I can find. It has, however, been our uniform custom to allow such items in all sides of this court for the fourteen years that I have sat here, and no distinction has ever been drawn between law, equity or admiralty. I think that the decisions on the admiralty side before the rule are competent authority if anything more than custom be necessary. Therefore I shall let the taxation stand as respects the premiums paid on surety bonds" (Rec., p. 34).

As stated by the Court, only one of these cases is an Equity Case and the decision is by a Circuit Judge.

An examination of the other cases cited by the lower court,

> The Volund, 181 Fed. 643,
> The Hurstdale, 171 Fed. 607,
> The John D. Dailey, 158 Fed. 642,

discloses that the reason for allowing premiums on surety bonds was that they were given in accordance with Rule XXI of the Admiralty Rules (for the Southern District of New York), which reads as follows:

> "Property seized by the Marshal may be released as follows:

'FIRST: By giving bond as provided in Section 941 of the Revised Statutes.

'SECOND: In suits for sums certain, by paying into Court the amount alleged in the libel as due, with interest as claimed therein up to the stated term next succeeding the return day, or by filing an approved *stipulation* for such alleged amount, with interest, and by payment into Court of the costs of officers of the Court already accrued, and by depositing also the sum of $250, to cover further costs; or in lieu of such deposit giving a stipulation for costs in the usual form.' " (Italics ours.)

Rule VII of the Admiralty Rules of this Court expressly allows premiums on Bonds to be taxed as costs.

The question is one that does not come up very often, hence the paucity of decisions; but in a case decided by the Circuit Court of Appeals for the 6th Circuit.

Lee Injector Mfg. Co. *vs.* Penberthy Injector Co., 109 Fed. 964.

It was held in an opinion by Judge Lurton (later a member of this Court):

" • • • The appellant has now filed a petition praying a retaxation of costs as follows:

3. That the sum of $10.50 paid a surety company for furnishing appeal bonds, be taxed as costs. This must be disallowed, as there is no authority for taxing such an item."

In another case, *In re* Michigan Cent. R. Co., 124 Fed. 727 (decided by the Circuit Court of Appeals for the Sixth Circuit), Judge Lurton again speaking for the Court at pages 732 and 733, said:

> "* * * In equity and in admiralty the taxation of costs, as between the parties, is a matter of sound legal discretion, and for this reason it is said that generally an appeal will not lie alone from a decree taxing costs (citing cases). But if the appeal be also upon the merits, the court, having the whole decree before it, may also consider the action of the court in this respect, upon a proper assignment of errors."
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> * * * * * * *
>
> "* * * It would be most extraordinary if such a question was not subject to review, for it would place the construction of the statute settling costs and fees entirely within the arbitrary control of each court to whom the question was presented."
>
> * * * * * * *
>
> "The power of the chancellor to fix an allowance out of a fund in court for the services of a special master, receiver, counsel, trustee, etc., is not uncontrollable, as it would be if orders making such allowances were not subject to review. In such matters great latitude may be properly accorded to the judge administering a property, and acquainted with the services and qualifications of persons rendering special services under the court's direction. Nevertheless, if wrong principles be applied in settling such compensation, or an allowance grossly excessive be

made, it would be competent for an appellate court to correct the wrong. The most extravagant allowances in such cases, and the grossest misapplication of correct legal principles, might go unchallenged unless the matter was subject to review by appeal. Trustees *v.* Greenough, 105 U. S. 527, 528, 26 L. Ed. 1157; Williams *v.* Morgan, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559; Mason *v.* Pewabic Mining Co., 153 U. S. 361, 14 Sup. Ct. 847, 38 L. Ed. 745. * * *"

In *The Gov. Ames* (187 Fed. 48), decided by the Circuit Court of Appeals for the 6th Circuit, Judge Putnam, speaking for the court, said at page 49:

"In *Ex parte* Hughes, 114 U. S. 548, Sup. Ct. 1008, 29 L. Ed. 281, an allowance claimed for the printing of briefs was denied, but the printing of what was, in the nature of pleadings, a part of the record, was allowed. Both rested on the fact of usage, which the court saw no justification in disturbing; but no usage is available here.

Many citations have been made, but none of them are authoritative with us except Lee Co. *v.* Penberthy Co., 109 Fed. 964, 48 C. C. A. 760, decided by the Circuit Court of Appeals, for the Sixth Circuit, on June 15, 1901. There the amount paid a surety company for furnishing an appeal bond was stricken out of the taxation. It is true that the Circuit Court of Appeals for the Ninth Circuit, in Jacobsen *v.* Expedition Co., 112 Fed. 73, 80, 50 C. C. A. 121, decided October 7, 1901, allowed the cost of giving security in damages

by a respondent who filed a cross-libel. In that case the security was required by Admiralty Rule of the Supreme Court 53, so that there was there behind the expenditure at least the requirement of the rule. The opinion, however, cited a number of cases, none of which fairly support the allowance. Likewise, the allowance of the premium on a bond for costs in *The Volund* (by the Circuit Court of Appeals for the Second Circuit), 181 Fed. 643, 667, was apparently based in the same manner on the fact that the bond was required by the rules of the court of the first instance. As therefore in this case, there is neither usage nor any court order, the objection of the Lejok to the allowance of this item of costs is sustained; and this without determining what would be the effect of an order if there had been one."

In *The Texas* (226 Fed. 897), decided by the Circuit Court of Appeals, Third Circuit, Judge McPherson, speaking for the Court, said at page 905:

"2. The next question is whether the District Court was correct in refusing to tax as part of the costs the premiums that were paid for the entry of corporate security. The precise point is not whether, in our opinion, modern conditions have made it desirable that such premiums should be taxed as costs, but whether any statute, or any rule or equivalent custom in the district of Delaware, required or justified the taxation. The clerk rejected the items on the following ground:

"I do not know of any statute that makes such items taxable as disbursements or otherwise, and there is no rule of court or established practice in this district permitting a recovery of such items. I am aware of no decision of the Circuit Court of Appeals for the Third Circuit or of the District Court for this District on this subject."

And the District Court affirmed the clerk's decision.

In our opinion the clerk was right in saying that no statute makes such an item taxable. The subject has been sufficiently discussed in the following cases: (Citing cases.) And we shall only add our approval of the argument that a rule of court, or a practice equivalent thereto, is needed to justify the taxation."

In Parkerson *v.* Borst (256 Fed. 827), a recent case, decided by the Circuit Court of Appeals for the 5th Circuit.

Judge Grubb, speaking for the Court, quoted the above case with approval and also said at page 829 as follows:

"The case of Edison *v.* American Mutoscope Co., 117 Fed. 192, a Circuit Court case, apparently supports the contrary rule. The Circuit Judge, however, bases his opinion upon the fact that the disbursement was one rendered necessary by a rule of practice, and the rule of practice is not set out in the opinion. In this case, the disbursement was not made as a result of any rule of practice, and there is no statute, rule or order or

usage, by which it is made a part of the taxable costs of the case. The District Judge properly disallowed the item. The judgment is affirmed and the plaintiff in error taxed with the costs of appeal."

POINT V.

The substitution of surety bonds in place of cash was solely for the benefit of appellee, and for that reason the item should not have been allowed.

The appellee not being satisfied with the conditions imposed by the original order of August 4, 1920, requiring the excess collections in cash to be deposited with the Special Master; moved to modify it so that bonds might be substituted in place of the cash. As was stated in the opinion of the court, appellee urged that in order to finance its temporary requirements it would have to probably pay 14 per cent. (Rec., p. 25). The idea of permitting the appellee to take down the money was for the purpose of saving this large percentage which it claimed it would have had to pay. The report of the Special Master shows that no cash was deposited with him. If, by taking down the moneys, appellee saved approximately 10 per cent, the amount it gained by the substitution of the bonds was ample recompense to it without imposing the cost of same upon the appellants.

POINT VI.

The appellants have already had substantial costs imposed upon them by reason of the order that permitted appellee to take down the impounded moneys.

The sum of $15,000 paid to Richard Welling, special master appointed for the purpose of having the custody of the impounded moneys, has been taxed against the appellants and also his expenses amounting to $2330.06 were allowed by the court (Rec., p. 8).

So that by allowing the appellee to substitute Surety Bonds in place of the cash, the appellants are required to pay $78,416.06; while, on the other hand, the appellee had the benefit of the use of money which it claims would have cost approximately 14 per cent, if it had been borrowed from outside sources.

In the prior suit (212 U. S. 19), the moneys were impounded during the litigation of the pending appeal, although it afterwards turned out that the statute was not confiscatory and that the impounded moneys belonged during the entire litigation to the consumers. Nevertheless, the company still has on hand, according to its report, to the Public Service Commission for the year 1922, the sum of $472,891.15 belonging to the consumers which was impounded during the pendency of that suit. The interest on this vast amount of money belonging to the consumers, which has never been paid over by the Consoli-

dated Gas Company, is more than sufficient in itself to pay the amount paid for the premiums on Surety Bonds, and the consumers ought at least to have the benefit of this fund at this time to the extent above indicated.

POINT VII.

Had appellee co-operated with the appellants in advancing the appeal there would have been no necessity for expending part of the sums for premiums on Surety Bonds.

Foster in his work on Federal Practice, Vol. 2, 6th Edition, says at page 1998:

> "§409. Costs in Equity. Courts of Chancery in general follow the rule of the Civil Law, *victus victori in expensis condemnatus est,* and decree the payment of costs by the unsuccessful to the successful parties to a suit before it. It often happens, however, that they depart so far from this rule as to deny costs to the successful party, and, in certain classes of cases, they will even compel him to pay costs to those against whom he obtains decree."

By the decree of the District Court the appellants were required to take their appeal within 30 days instead of the three months allowed by the statutes, and also were required to perfect it at an early date and move to advance the argument of the appeal (Rec., p. 33).

The appellants made every effort to expedite the perfecting of the appeal and the certification of the record. (Case No. 807 October Term 1920; No. 257 October Term 1921.) After the record was ready the appellants made a motion in this Court in March 1921, to have the case heard that Spring. This motion was vigorously opposed by appellee which resulted in the court setting the case down for argument in October 1921, although another case where no opposition had been made to the advancement of the appeal, was advanced by this Court for April 11, 1921. Before the date set for the argument in October, appellee made a motion to continue the argument for a later date, which was granted, against our protest, and it was finally set down for November 14, 1921. A great deal of the delay in the argument of the appeal and the determination of the appeal is attributable to the appellee; consequently, the result of all this was to cause more money to be impounded and to make it necessary for the company to deposit additional Surety bonds with the Special Master, which extra costs they now seek to have appellants pay.

POINT VIII.

Abuse of discretionary power is reviewable by this Court.

It is fundamental that discretion will not be ordinarily reviewed; but where under the circumstances it appears to have been exceeded or abused the general principle will not apply. In

Newton vs. *Consolidated Gas Company of New York,* 259 U. S. 101, it was held that the discretionary power of a Federal Court under Equity Rule 68, to fix the compensation of a master, does not extend to arbitrary and unreasonable action; in that case it was claimed discretion was abused in that the allowance made for the master's fees was excessive. Mr. Justice McReynolds, speaking for the Court, said, at page 105:

> "Discretion within intendment of the rule is a judicial one; it does not extend to arbitrary and unreasonable action and our review is limited to the question of its improvident exercise * * *."
>
> * * * * * *
>
> "Ordinarily we may not substitute our judgment for its deliberate conclusions nor interfere with the exercise of its discretion. But when that Court falls into error which amounts to abuse of discretion and the cause comes here by proper proceedings appropriate relief must be granted."

If this Court has the power to review an order based upon abuse of discretion as was held in the above case, there must necessarily be the right to bring the question up for review.

Foster in his work on Federal Practice, Vol. 2, 6th Edition, says at page 1992:

> "When, however, it is said as it often is, that the award of costs in equity is purely discretionary, it should not be supposed that Courts of Equity are governed by no fixed principles in their decisions relative to the

> costs of proceedings before them. All that is meant by the expression is that, in awarding costs, they will take into consideration the circumstances of the cases before them and the situation or conduct of the parties, and exercise with reference to these points a discretion governed by certain reasonable definite rules, the enforcement of which is not dependent upon the caprice of the Judge by whom each cause happens to be heard, but is often a ground of review by an Appellate Tribunal."

In the case of McIntosh *v.* Ward, decided by the Circuit Court of Appeals, for the 7th Circuit (159 Fed. 66), Judge Baker, speaking for the Court, said at pages 68, 69:

> "Appellees insist that nothing is involved but a matter of costs, and therefore that the appeal will not lie. The assertion quite evidently begs the question. The record presents the reviewable inquiry whether certain items that are embodied in the final judgment against Appellant are or are not taxable costs as between the parties.
>
> By the ancient common law items of expense in the conduct of litigation, paid or incurred by one party, were not allowable in the judgment against the other. Such allowances were of statutory origin. Our statute of 1853 (sections 823 and 983, Rev. St. [U. S. Comp. St. 1901, pp. 632 706]) provides what shall, as costs, "be included in and form a portion of a judgment or decree against the losing party." And in Trustees

v. Greenough, 105 U. S. 527, 26 L. Ed. 1157, it was said that costs as between party and party are confined to the matters allowed by the fee-bill act. The challenged items are not within the statute; but appellees claim that the Circuit Court as a court of equity had power to include them in the judgment as costs. Though at law the losing party is adjudged to pay to his adversary the latter's taxable costs laid out and expended in the litigation, in equity the chancellor has a broad discretion respecting the allowance and apportionment of such costs between the parties. Courts of equity also have a wide discretion in making and controlling allowances from the fund for services and expenses in conserving and administering a fund that has been brought into court. And when the appointment of a receiver is determined to be void, or when the fund proves insufficient, it has been held that a court in the exercise of its equity powers may compel the party who procured the receiver to be appointed to pay into court a sum sufficient to meet the expenses of the receivership. Gluck & Becker on Receivers (2d Ed.) pp. 540, 541; Smith on Receivers, pp. 587, 588; Beach on Receivers, (2d Ed.) §§773, 774.) *but, in our opinion, the discretion of a court of equity does not authorize it to require one party (and the sureties on his cost bond) to pay to the other, under the name of costs, items paid from the fund for services and expenses in administering a fund properly in court, nor any other items not within the fee-bill act.* (Italics ours.)

In *Kell* v. *Trenchard*, 146 Fed. 245, decided by the Circuit Court of Appeals for the 4th Circuit. Judge Waddill, speaking for the Court at pages 246 and 247 said:

> "The appellees insist that the action of the lower court complained of is not subject to review by this court, as it relates purely to a matter of costs, which is a matter within the discretion of that court, and not subject to review on appeal. In the view taken by this court, that question is not a very material or practical one, since the appeal in this case relates to the construction to be given to a judgment and decree of this court; and for that reason the same should be subject to the review and action of this court, and it can manifestly best determine what was meant and intended by its own decree. A general discussion and citation of authorities on the subject of the right of appeal in cases affecting costs will be found in Re Michigan Central R. R. Co., 124 Fed. 727, 733, 59 C. C. A. 643 a decision of the Circuit Court of Appeals for the Sixth Circuit. In the federal practice in equity the giving or withholding costs or the apportionment and division thereof is a matter within the discretion of the court; such discretion, however, to be exercised, not arbitrarily, but with reference to the general principles of equity and special circumstances of each case. 2 Bates. Fed. Eq. Proc. §§842, 844; Primrose *v.* Fenno (C. C.), 113 Fed. 375; Electric Co. *v.* Scott (C. C.), 101 Fed. 524, 11 Cyc. 36."

In a recent case brought in the New York State Supreme Court to test the constitutionality of a

similar statute, the court refused to award any costs against the defendant public officials.

> Municipal Gas Co. *v.* Public Service Commission, et al., 113 Misc. Rep. (N. Y.) 748.

POINT IX.

We contend, therefore, that there is no authority for taxing the cost of premiums on Surety Bonds, such as in the instant case as a disbursement; there is no rule or established usage, justifying or permitting such an item to be taxed and furthermore, in all equity and justice it should not be allowed as the substitution was for the convenience and sole benefit of the appellee.

The closing paragraph of the opinion of this court in (Willcox *v.* Consolidated Gas Co., *supra*) is as follows:

> "It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the Court. To that end we reverse the decree, with directions to dismiss the bill without prejudice, and it is so ordered."

In the opinion in the present case the District Court said as follows (267 Fed. 233):

> "This bill was filed under the leave given in Willcox *v.* Consolidated Gas Co., 212 U. S. 19, to begin a new suit of the same kind after a period of probation should have tested the adequacy of the rate established by the statute." • • •

The master also recognized that this was a continuation of the old suit. Complainant in its direct case offered the testimony of the following deceased witnesses and which was read into the record in spite of the objections of the defendants:

> Colin C. Simpson, pages 6898 to 7025;
> Frederick J. Mayer, 7026 to 7353
> Edmund C. Preiss, 8069 to 8136;

and also in rebuttal certain testimony was offered of Colin C. Simpson at pages 14908 to 15113, and Frederick J. Mayer, pages 15113 to 15292; thus about 726 pages of testimony of the old suit were in the record in this case. (Pages referred to are in the record in Case No. 257, October Term, 1921.)

After this Court had reversed the Circuit Court in the original suit, (Willcox *v.* Consolidated Gas Co., *supra*), the company was required to return the excess collected over 80 cents which was the rate fixed by Chapter 125 of Laws of 1906.

The checks which were made out in payment of refunds to consumers are significant, and were endorsed on the back as follows:

> "This repayment is made in compliance with the directions of the United States Circuit Court and without prejudice to a further

test of the Eighty Cent Gas Act pursuant to the opinion and decree of the United States Supreme Court."

One of the questions that arose was that of the disposition of interest that had accrued on the impounded funds during the period of the litigation.

The headnote of the opinion, Central Trust Co. *v.* New Amsterdam Gas Co., 167 Fed. 983, is as follows:

> "An injunction *pendente lite* was granted at suit of gas companies restraining the enforcement of a reduced rate of charge for gas, but requiring the companies to deposit the excess collected above such rate with the master to await the final determination of the case. In the meantime the master realized some interest on the fund. Some 2½ years later the injunction was dissolved, and it became necessary to refund the amount so impounded to customers to the number of 873,000. Held, that the interest accumulation would be used in the first instance in paying the expense of administering the fund, especially as the cost of making distribution of the same among several million items would absorb a large part of it, and that no disposition of the excess remaining, if any, would be made until the amount of such excess was ascertained."

By this decree, the consumers were deprived of the interest earned by the impounded funds, and the gas company was relieved of the expense of distributing the money.

According to the report filed with the Circuit Court, dated November 8, 1909, the Special Master spent the sum of $380,520.56 and later $15,-124.13, or a total of $395,644.69, in distributing the impounded fund.

These expenses were taken from the fund in accordance with the directions of the Court; the consumers' money being used to pay an expense which should have been borne by the Gas Company, and even after paying out this enormous sum for expense of distribution, the Company still has in its possession almost $500,000.00.

It therefore appears that the precedent was established that in a case such as the instant one, the impounded fund should bear the costs incident to it.

CONCLUSION.

We respectfully submit that the decree of the District Court should be reversed, and the judgment reduced from $129,693.97 to $53,607.97, with costs to appellants.

Dated, New York, February 4th, 1924.

Respectfully submitted,
GEORGE P. NICHOLSON,
Corporation Counsel,
Solicitor for Appellant, Edward Swann,
Municipal Building, New York.

CARL SHERMAN,
Attorney General.

WILBER W. CHAMBERS,
Solicitor for Appellant, Charles D. Newton,
Albany, New York.

JAMES A. DONNELLY,
HARRY HERTZOFF,
WILBER W. CHAMBERS

Supreme Court of the United States.

CHARLES D. NEWTON, as Attorney-General of the State of New York, and EDWARD SWANN, as District Attorney of New York County, *et al.*,
Appellants,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Appellee.

Affidavit of Appellee.

STATE OF NEW YORK,
City and County of New York.

JOHN A. GARVER, being duly sworn, says:

1. I am a member of the firm of Shearman & Sterling, the solicitors for the appellee, and am of counsel in the above entitled cause.

2. A copy of the record on the present appeal has not yet been received by me or my firm, and I am informed and believe that it has not yet been printed. I have no objection to the entry of an order advancing this appeal, provided the record is received at least one month prior to the advanced date.

JOHN A. GARVER

Sworn to before me,
December 28, 1923.
FREDERIC N. GILBERT
Notary Public,
Westchester Co.
Certificate filed in New York County.

FILED
FEB 16 1924
WM. R. STANSBURY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 665.

CHARLES D. NEWTON, AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK, EDWARD SWANN, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, *et al.*,

Appellants,

against

CONSOLIDATED GAS COMPANY OF NEW YORK,

Appellee.

BRIEF FOR APPELLEE,

on appeal from order assessing costs.

SHEARMAN & STERLING,
Solicitors for Appellee,
55 Wall Street,
New York.

JOHN A. GARVER,
Of Counsel.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 565.

CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, *et al.*,

Appellants,

AGAINST

CONSOLIDATED GAS COMPANY OF NEW YORK,

Appellee.

Brief for Appellee, on appeal from order assessing costs.

Statement.

Appeal by only two of the three defendants (the Attorney General and the District Attorney of New York County, *the Public Service Commission, the other defendant, not appealing*) from an order of Judge Learned Hand made on April 30, 1923 (pp. 20-1), retaxing certain costs upon a rehearing held at his request.

While the appeal is from the entire order of Judge Hand (p. 22), only one of the six items passed upon by him is objected to in the assignment

of errors (p. 21), namely, an item of $76,086, representing premiums paid by the plaintiff on surety bonds required by the Court to be given by the plaintiff, *pending the appeal by the defendants* to this Court from the final decree in favor of the plaintiff. All the other five items of costs were decided by Judge Hand in favor of the defendants.

The bonds required to be given during the pendency of the appeal represented the difference between a maximum rate of $1.20 per thousand cubic feet permitted by the Court and the statutory rate of 80¢ which the Court had held to be confiscatory.

POINTS.

FIRST.

The appeal is not from a final decree.

I. The order appealed from is dignified by calling it a "decree" (p. 22). Reference is also made to a "judgment" entered on this "decree", on July 27, 1923; but this so-called "judgment" is nothing but the record of the final taxation of costs by the Clerk (pp. 36-9). The appeal, however, does not include this so-called "judgment", but is confined solely to the order of Judge Hand retaxing the costs ("Fifth", at bottom of p. 22).

II. The previous appeal by the defendants herein, which involved the question of the compensation of the Special Master, was from a formal decree of the Court (259 U. S., 105).

SECOND.

No appeal will lie where the only question is one of costs.

Even if the item of costs objected to had been included in a final decree or supplemental decree, an appeal does not lie to this Court where the appeal is confined solely to the question of costs.

> Canter *v.* Insurance Companies, 3 Pet., 307, 319;
>
> Paper Box Cases, 105 U. S., 766, 772;
>
> City Bank of Fort Worth *v.* Hunter, 152 U. S., 512, 516;
>
> Citizens Bank *v.* Cannon, 164 U. S., 319, 323;
>
> Wigert *v.* First National Bank, 223 U. S., 670, 672.

In Trustees *v.* Greenough (105 U. S., 527), the appeal was from a decree of the court awarding an allowance out of a trust fund *in possession of the Court,* to one who had succeeded in securing the fund. The distinction between that case and cases where the sole question is one of costs alone was pointed out in Citizens Bank *v.* Cannon (*supra*), where the Court said (p. 323):

> "As a general rule, an appeal will not lie in a matter of costs alone."

Moreover, in Trustees *v.* Greenough, the Court, before passing upon the main question, carefully considered (p. 528) whether the orders which had been directed by the Court amounted to a final decree.

This great tribunal was certainly never intended to be made an agency for the correction of clerical errors.

THIRD.

The previous appeals.

This Court has been treated to a full measure of appeals in the course of the present litigation. The appellants, especially the City of New York, whose Corporation Counsel has appeared as solicitor for the District Attorney, have been insistent upon having every contention unsuccessfully advanced by them reviewed by this Court.

The previous appeals to this Court have been as follows:

I. An appeal by the City of New York from an order denying its application to intervene.

City of New York *v.* Consolidated Gas Co., 253 U. S., 219 (June 1, 1920).

II. The main appeal from the final decree declaring the eighty-cent statute confiscatory.

Newton *v.* Consolidated Gas Co., 258 U. S., 165 (March 6, 1922).

III. An appeal by the defendants from the supplemental decree fixing the compensation of the Special Master.

Newton *v.* Consolidated Gas Co., 259 U. S., 105 (May 15, 1922).

FOURTH.

Surety bonds during the pendency of the appeal only.

I. Judge Hand correctly states the fact in his opinion (p. 34), that the surety bonds upon which the premiums in question were paid were those which the plaintiff was required to give *pending the appeal* taken to this Court *by the defendants* from the final decree. They were not the usual surety bonds that plaintiff is required to give as a condition of obtaining a temporary restraining order during the pendency of the suit. In the present litigation, the plaintiff did not apply to the Statutory Court for an injunction *pendente lite,* but continued to supply gas at the statutory rate of eighty certs while the trial was proceeding before the Special Master. The District Court found that the rate complained of was confiscatory, thus rendering the statute void as to the plaintiff and leaving it free to put in force a higher rate, the reasonableness of which could be questioned only by the Public Service Commission.

Morrell *v.* Brooklyn Borough Gas Co. (231 N. Y., 398).

The plaintiff did not, therefore, need any injunctive relief for its protection, as the final decree avoiding the statute would have been a complete defense to any action or proceeding subsequently instituted against the Company by a public official or private consumer.

In re Engelhard, 231 U. S., 646, 651;
City of New York *v.* N. Y. Telephone Co., —U. S.—(March 12, 1923).

Judge Hand, however, granted injunctive relief; and he made it a condition for doing so that, pending the appeal by the defendants to this Court, the Gas Company should not charge more than $1.20, and that it should give surety bonds for the return of the excess over eighty cents, if the defendants should be successful upon their appeal (pp. 30-1).

This Court held that the District Court, sitting as a court of equity, had the power to impose these conditions (258 U. S., 165, 177). Thus, although the statute which limited the right of the Gas Company to charge more than eighty cents had been set aside and although the trial Court recognized that $1.20 might not be an adequate charge, it declined to permit the Gas Company to collect such charge from its consumers and use the proceeds in its business, unless, pending the appeal *by the defendants,* the Company would impound the excess over eighty cents or would give surety bonds for its return, if the decree should be reversed.

Surely, if the District Court possessed this extraordinary power, it might, in the same connection, have provided that if the appellants were not successful on the appeal, they should bear the expense to which the Company might be put in giving the bonds; and that expense was undoubtedly very much more than the mere premiums paid for the surety bonds, as it necessitated the keeping of the books of account of the Company in such manner, pending the appeal, as to show the sum covered by the liability assumed by the surety companies, while the arrangement for giving the bonds had to be made not merely with one company, but with many companies, inasmuch as the decree limited the amount for which any single company could assume liability to $500,000 (p. 32).

II. The order appealed from, allowing the item of $76,086, was made by Judge Learned Hand, under whose direction the final decree requiring the surety bonds to be given, had been entered. He might have provided in that decree for the payment of these premiums by the appellants, if their appeals should not be successful, especially in view of the fact that, in reaching the conclusion that the statute was confiscatory as to the plaintiff, he had resolved every doubt in favor of the defendants, an attitude to which this Court made express reference in its unanimous decision of affirmance (258 U. S., 165, 174). But if he had the power, at that time, to require the defendants to pay for the premiums on the surety bonds, in case they were not successful upon the appeal, he certainly had the same power subsequently, when the question of payment was brought to his attention.

FIFTH.

General usage relied upon by Judge Hand.

I. Judge Hand relied upon the decisions of the courts in the Southern District of New York, which had for many years recognized the right to include in the costs the amount of the premiums paid on surety bonds (p. 34); and he referred to three reported decisions on the subject.

Edison *v.* American Mutoscope Co., 117 Fed., 192 (1902);
The Hurstdale, 171 Fed., 607 (1909);
The Voland, 181 Fed., 643, 667 (1910).

1. In Edison *v.* American Mutoscope Co., the Clerk, in taxing the costs, had disallowed two items representing premiums paid for appeal and supersedeas bonds. Lacombe, *C. J.*, reversed this ruling, on the ground that the disbursements were legitimate and proper and were in accordance with the settled practice of the court.

2. In The Hurstdale, objection was made to the taxation of a payment made to obtain an indemnity bond, on the ground that the amount was paid to individuals, instead of to a surety company. Held, that this made no difference.

3. The Voland was a unanimous decision of the Circuit Court of Appeals (Second Circuit), that premiums paid to a surety company for furnishing a bond for costs in admiralty should be allowed as part of the taxable costs.

II. The appellants, in their brief, seem to be of the opinion that courts of equity have no discretionary power to allow costs, unless the power is

expressly conferred upon them by the general Equity Rules. But nothing is better settled than that a court of equity has very broad discretion in awarding costs (Pomeroy's Equity Jurisprudence (4th ed.), § 1328, note; 15 *Corpus Juris*, 33-4); and, under Equity Rule 68, the Court might even direct the master's fees to be paid by the *successful* party.

III. The general attitude of the public authorities in New York, on the question of the liability for premiums paid on surety bonds, is seen in the provisions of Section 286 of the Surrogate's Court Act (L. 1921, Ch. 438), a reenactment of a statute that has long been in existence:

> "§ 286. *Fiduciaries may include cost of bonds as necessary expense.*
>
> A guardian, trustee, executor or administrator required by law to give a bond as such, may include as a part of his necessary expenses such reasonable sum, not exceeding one per centum per annum, upon the amount of such bond paid his surety thereon, as such court or judge allows."

SIXTH.

The appeal should be dismissed, or the order appealed from should be affirmed.

Washington, February 15, 1924.

SHEARMAN & STERLING,
Solicitors for Appellee,
55 Wall Street,
New York.

JOHN A. GARVER,
Of Counsel.

NEWTON, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL., *v.* CONSOLIDATED GAS COMPANY OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 565. Argued March 4, 1924.—Decided May 12, 1924.

1. Where a New York Commission, made a defendant in the District Court, was later abolished by c. 134, New York Laws 1921, *held*, that its joinder, or exclusion by summons and severance, was not necessary to sustain an appeal by its codefendants from an order taxing costs. P. 81.
2. An order of the District Court taxing costs in an equity suit otherwise ended, has the finality requisite for review by appeal. P. 82.
3. The rule of the federal courts forbidding appeals from decrees for costs only does not apply when the power of the court to assess the items in question, and not merely the exercise of its discretion, is in issue. *Id.*
4. The District Court, finding a statutory gas rate confiscatory, enjoined public officials from enforcing it, but, as a condition, required the plaintiff gas company to impound with a special master all sums collected from consumers in excess of the rate, pending determination of the case on appeal, and, later, for the protection of the plaintiff and to benefit consumers, permitted the plaintiff to withdraw the fund so accumulated by substituting surety bonds, conditioned for its return with substantial interest should the rate be upheld. The injunction having been affirmed, *held*, that the premiums paid for the bonds were taxable, and rightly taxed, against the defendants, as costs in conformity with a usage of that district. P. 84.

291 Fed. 704, affirmed.

APPEAL from a decree of the District Court taxing costs. For other phases of the suit, see 258 U. S. 165, 259 U. S. 101, and 264 U. S. 571.

Mr. Harry Hertzoff, with whom *Mr. George P. Nicholson*, *Mr. Carl Sherman*, Attorney General of the State of

New York, *Mr. Wilber W. Chambers* and *Mr. James A. Donnelly* were on the brief, for appellants.

This is a final order within the decisions. *Odell* v. *Batterman,* 223 Fed. 292; *Central Trust Co.* v. *United States Light & Heating Co.,* 223 Fed. 420; *Georgia Railway & Power Co.* v. *Decatur,* 262 U. S. 432.

This Court has jurisdiction of the entire case and of all questions involved in it. *Farmers' Loan & Trust Co., Petitioner,* 129 U. S. 206; *Citizens' Bank* v. *Cannon,* 164 U. S. 319; *Ex parte Hughes,* 114 U. S. 548.

The court below had the right, in granting the injunction, to direct the impounding of the difference between the statutory rate and that allowed under the injunction.

There is no rule of this Court authorizing or permitting sums paid for surety bonds, to be taxed as costs. Rev. Stats., §§ 823, 983; *Edison* v. *American Mutoscope Co.,* 117 Fed. 192. An examination of *The Volund,* 181 Fed. 643; *The Hurstdale,* 171 Fed. 607; and *The John D. Dailey,* 158 Fed. 642, discloses that the reason for allowing premiums on surety bonds was that they were given in accordance with Rule XXI of the Admiralty Rules for the Southern District of New York.

In *Lee Injector Mfg. Co.* v. *Penberthy Injector Co.,* 109 Fed. 964, the taxation of surety premiums was disallowed. See *In re Michigan Central R. R. Co.,* 124 Fed. 727; *The Governor Ames,* 187 Fed. 48; *The Texas,* 226 Fed. 897; *Parkerson* v. *Borst,* 256 Fed. 827.

The substitution of surety bonds in place of cash was solely for the benefit of appellee, and for that reason the item should not have been allowed.

The appellants have already had substantial costs imposed upon them by reason of the order permitting appellee to take down the impounded moneys.

Had appellee coöperated with the appellants in advancing the appeal there would have been no necessity for expending part of the sums for premiums on surety bonds.

Mr. John A. Garver, for appellee, submitted.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This was an equitable action to enjoin the continued enforcement of c. 125 of the Laws of New York of 1906, which fixed at 80 cents a thousand feet the price at which gas was to be furnished to private consumers in the various boroughs in the City of New York, on the ground that the rate was confiscatory and violated the rights of the Company under the due process clause of the Fourteenth Amendment of the Federal Constitution.

The main controversy was settled in favor of the Company by this Court in March, 1922. 258 U. S. 165. Upon another appeal, we directed a reduction of the Master's fees by $28,750. 259 U. S. 101. When the case reached the District Court for further proceedings, the defendants made a motion to retax costs, objecting to half a dozen items charged. The court allowed certain exceptions but overruled others. The only one overruled and here insisted on is for $76,086.00 for premiums paid by the Company to surety companies for bonds securing the repayment of a large amount of money impounded with the special master.

When the District Court found that a rate of 80 cents was confiscatory, it granted an injunction to prevent the Attorney General of the State, the District Attorney of New York County, and the Public Service Commission from enforcing such a rate, but as a condition of such injunction, it required the Company to impound with a special master all sums charged for gas to consumers over and above the 80-cent rate until the issue could be finally settled in this Court. This Court, although it found error in certain other limitations of the order, held that so much of it was within the court's discretion. 258 U. S. 165. The plaintiff, after the order of impounding

was made, secured leave from the court to substitute the surety bonds in lieu of cash. In granting this leave, the District Judge said:

"The plaintiff urges with force, I think, that to impound all the moneys over eighty cents for a period perhaps of a year will cause loss both to itself and to the consumers. It suggests that it have the right to substitute adequate securities. The best that the special master can get on the deposits is probably three and a quarter per cent; the plaintiff if required to finance its temporary requirements must pay much more, it says fourteen per cent. In any case it will sustain a loss which will profit no one but the banks, so far as appears. I see no advantage in insisting upon impounding the moneys if adequate security can be otherwise provided."

The bonds were required to secure not only the cash for which they were substituted but interest at seven per cent. to become part of the fund. The court continued:

"I have required a substantial rate of interest because the plaintiff will be in effect using the consumers' money. On the one hand the consumer profits by getting more than he could from the banks, on the other the plaintiff profits by being relieved from high rates of interest. The rate at which the plaintiff has sold its bonds is seven per cent. and on short financing the rates are much higher. I think that seven per cent. should be the rate, even though the plaintiff must pay a premium to get the bond; it will recover back all that the consumers are not eventually entitled to."

From the final decree of the District Court fixing the costs, an appeal was taken to this Court. To that appeal the Public Service Commission of New York, as defendant in the suit, was not made a party and no summons and severance was issued against it. Accordingly the

appeal was dismissed in the following *per curiam*, 264 U. S. 571:

"Dismissed for the want of jurisdiction upon authority of *Masterson* v. *Herndon*, 10 Wall. 416; *Hardee* v. *Wilson*, 146 U. S. 179, 180; *Sipperley* v. *Smith*, 155 U. S. 86, 89; *Maytin* v. *Vela*, 216 U. S. 598, 601."

Upon a petition for rehearing the appellants bring to the knowledge of this Court that by c. 134 of the Laws of 1921, the Public Service Commission for the First District which was here concerned was abolished, and that, therefore, the appellants were not required by summons and severance to exclude from the future capacity to appeal, a defunct state board originally joined with them as a codefendant. *Mercantile Trust Co.* v. *Kanawha & Ohio Ry. Co.*, 58 Fed. 6, 14. We think the abolition of the Public Service Commission made it unnecessary to make it a party to this appeal and that the dismissal heretofore entered for lack of service of a summons and severance upon it should be set aside.

The appellee insists that the appeal must be dismissed, first, because it is not from a final decree, and, second, because no appeal lies from a decree for costs alone.

First. If the subject matter is appealable at all, there would seem to be no doubt that the decree has all the characteristics of finality. An execution can issue at once to collect the costs as taxed, including the item here complained of. *Trustees* v. *Greenough*, 105 U. S. 527; *Farmers' Loan & Trust Co., Petitioner*, 129 U. S. 206; *In re Michigan Central R. R. Co.*, 124 Fed. 727, 731.

Second. Is the order of the District Court for this controverted item appealable? There is no doubt that, as a general rule, an appeal does not lie from a decree solely for costs, and if an appeal on the merits be taken and affirmed, it will not be reversed on a question of costs. *Canter* v. *American Insurance Co.*, 3 Pet. 307, 319; *Elastic Fabrics Co.* v. *Smith*, 100 U. S. 110, 112; *Paper-Bag*

Cases, 105 U. S. 766, 772; *City Bank of Fort Worth* v. *Hunter,* 152 U. S. 512, 516; *Stuart* v. *Boulware,* 133 U. S. 78; *Du Bois* v. *Kirk,* 158 U. S. 58, 67; *Citizens' Bank* v. *Cannon,* 164 U. S. 319, 323; *Wingert* v. *First National Bank,* 223 U. S. 670, 672.

Questions of costs in admiralty and equity are discretionary and the action of the court is presumptively correct. *United States* v. *Brig Malek Adhel,* 2 How. 210, 237; *The Scotland,* 118 U. S. 507, 519. The allowance of costs in the federal courts rests not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes. *Ex parte Peterson,* 253 U. S. 300, 316; and see *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 460.

The rule forbidding appeals from decrees for costs only is easily deducible from the discretion vested in the trial court in fixing them and the better opportunity of that court to exercise that discretion from its greater intimacy with details of the pleadings, hearings, and orders in the case. When the power of the court to assess costs against either party is not in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are not allowed. But the rule is not absolute and should not be enforced when the trial court assumes the power to assess as costs against a fund or a party expenditures of a class not legally assessable as such. Where a question of this kind is made, appeals have been allowed. Thus in *Trustees* v. *Greenough,* 105 U. S. 527, an appeal was allowed from a decree in equity solely for costs when the question was whether they could be properly paid out of a fund in the control of the court. So in *In re Michigan Central R. R. Co.,* 124 Fed. 727, an intervener was allowed to appeal from a decree of a trial court, allowing costs in favor of the clerk, when it was objected that neither by statute nor general law could such costs be

allowed by the court in favor of the clerk. The question is fully considered by the Circuit Court of Appeals of the Sixth Circuit in an opinion by Judge Lurton, afterwards Mr. Justice Lurton, of this Court. The many cases cited in which appeals from decrees for costs had been denied were distinguished as involving a question not of positive law, but of discretion. We think the distinction made in that case a sound one and that as the question is here presented, the appeal is a proper one.

The question is whether premiums for bonds paid by a party litigant to preserve his rights and save him from loss under the orders of court pending the litigation, can be taxed as costs against the defeated party. There has been considerable difference of opinion among the District Courts and the Circuit Courts of Appeals on this subject. This Court has never considered it. *The South Portland*, 95 Fed. (D. C.) 295; *Jacobsen* v. *Lewis Klondike Expedition Co.*, 112 Fed. 73 (C. C. A., Ninth Circuit); *Edison* v. *American Mutoscope Co.* (C. C.), 117 Fed. 192; *The John D. Dailey* (D. C.), 158 Fed. 642; *The Bencliff* (D. C.), 158 Fed. 377; *The Hurstdale* (D. C.), 171 Fed. 607; *The Volund* (C. C. A., Second Circuit), 181 Fed. 643; *Jones* v. *Edward B. Smith Co.* (C. C.), 183 Fed. 990; *The Europe* (C. C. A., Ninth Circuit), 190 Fed. 475, 481, are cases in which either by rule of court or through usage, such costs have been taxed in admiralty cases or equity causes. In *Lee Injector Mfg. Co.* v. *Penberthy Injector Co.* (C. C. A., Sixth Circuit), 109 Fed. 964; *The Governor Ames* (C. C. A., First Circuit), 187 Fed. 40, 48; *The Texas* (C. C. A., Third Circuit), 226 Fed. 897, 905; *Parkerson* v. *Borst* (C. C. A., Fifth Circuit), 256 Fed. 827; *In re Hoyt*, 119 Fed. 987 (D. C.), and in *The Wülowdene*, 97 Fed. 509 (D. C.), it is held that where the disbursement is not made as the result of any rule of practice and there is no statute, rule, or usage by which it is made a part of the taxable costs of the case, it cannot be allowed. In

The Texas, supra, the Circuit Court of Appeals of the Third Circuit, after expressing its approval of the view that a rule of court or a practice equivalent thereto is necessary to justify the taxation of such costs, said:

"But we may also say that we think such a rule or practice has become so desirable that we feel confident the court below will take an early opportunity to conform its procedure in this respect to the custom prevailing in other districts."

The District Judge, in passing on the issue, said that it had been the custom in the Second Circuit to allow as costs, premiums on stipulations given to release vessels from arrest, citing *The Volund, supra; The Hurstdale, supra; The John D. Dailey, supra;* that Judge Lacombe in *Edison* v. *American Mutoscope Co., supra,* had allowed as costs premiums upon a supersedeas bond in an equity case, and that there had been a uniform usage for the fourteeen years during which he had sat in that District to allow such items.

We think that under the usage thus shown in the Second Circuit, the District Court had power to assess these premiums as costs in this suit in equity. It is apparent from the circumstances already set forth that the order made by the District Court under which these bonds were secured and substituted for cash was not only in the interest of the Company but of the consumers in whose behalf the defendants below were contending. Had the state authorities prevailed in this Court, they would have secured from the surety companies on these bonds for distribution among the customers not only the amount of money impounded but also seven per cent. interest thereon to compensate them for the taking of their money and the delay in its return. As the cause went against them, it was not an abuse of discretion to hold that the defendants who have conducted the litigation and lost should pay the costs of an arrangement made in their interest, because of an expense with which the Company

had been unjustly burdened. It may be that in a circuit and district where no usage or rule of court exists, such costs may not be taxed. We are not called upon to decide that. It is enough, that we may decide this appeal, to hold that it was not an abuse of discretion or a violation of law for the District Court in the Second Circuit to allow the item.

By the Act of August 13, 1894, c. 282, 28 Stat. 279, Congress has made elaborate provision for the safe use of surety companies as security upon bonds required in court and other proceedings, and while it does not exclude individual sureties, it offers a most convenient and stable means of obtaining indemnity against the default of parties. This is much to be preferred to individual sureties because a properly conducted surety company makes it its business promptly to investigate and to meet its liabilities. Acceptance of the service of such companies is, of course, upon the basis of a regular rate of compensation, and where a party litigant has, because of the claim of the opposing party, been compelled to furnish such security, and it turns out that it was wrongly required, a rule of court or usage which imposes the expense of the security on the defeated party is not unreasonable.

The decree of the District Court is affirmed.